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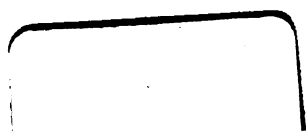
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**THE**  
**REVISED REPORTS.**



THE  
REVISED REPORTS

BEING  
A REPUBLICATION OF SUCH CASES  
IN THE  
ENGLISH COURTS OF COMMON LAW AND EQUITY,  
FROM THE YEAR 1785,  
*AS ARE STILL OF PRACTICAL UTILITY.*

EDITED BY  
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## PREFACE TO VOLUME XXVI.

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IN the equity part of this volume the case of most general interest is *Abernethy v. Hutchinson*, p. 237, which for many years remained the leading and indeed only authority on the right to restrain the publication of matter publicly or privately communicated by word of mouth. The later decision of the House of Lords in *Caird v. Sime*, 12 App. Ca. 326, has by no means exhausted the questions of this class that may yet arise.

The judgment of Bayley, J. in *R. v. Harvey*, at p. 343, contains a lucid and, I think, an early declaration of the principle "that a party must be considered, in point of law, to intend that which is the necessary or natural consequence of that which he does;" a principle carried by the modern development of the law of damages to a degree of exact refinement which seventy years ago would have been thought chimerical.

*Forbes v. Cochrane*, p. 402, is a celebrated case, though not of much application in any ordinary practice. It does not touch the question what is to happen if a slave takes refuge on board a Queen's ship lying in the slave country's territorial waters in time of peace. That question, though extra-judicially discussed within our own time, has never been regularly determined, and probably, for want of subject-matter, never will be. Twenty years ago, slavery being then still authorized in the territories of some civilized Powers, it was a practical and troublesome question enough, and was considered by a Royal Commission, not without difference of learned opinions. Some account of this may be found in Sir James Stephen's *History of the Criminal Law*, vol. ii. pp. 43—58.

In *Doe d. Thomas v. Acklam*, at p. 559, we find the Court of King's Bench already expressing satisfaction at being in agreement with the Supreme Court of the United States on a point of common interest to both nations.

The case of *A.-G. v. Le Merchant*, reproduced from 1 T. R. 201, *n.*, at p. 703, was originally omitted as being now not material for English practice; but a learned friend has called our attention to the fact that

its bearing on the constitutional law of the Channel Islands may still be of importance: see at p. 707. The main point in the case is covered by the statement of BULLER, J. in the principal case of *R. v. Watson*, 1 R. R. at p. 463, 2 T. R. at pp. 200, 201.

F. P.



LORD ELLIOTT

SIR THOMAS

LORD GIDLEY

SIR J. S.

SIR JOHN

SIR CHAS.

SIR JOHN

SIR G. A.

SIR W.

SIR JOS.

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## OF THE

### HIGH COURT OF CHANCERY.

1828—1826.

(4 GEO. IV.—7 GEO. IV.)

---

LORD ELDON,† 1807—1827 . . .		<i>Lord Chancellor.</i>
SIR THOMAS PLUMER, 1818—1824 . . .	}	<i>Masters of the Rolls.</i>
LORD GIFFORD, 1824—1826 . . .		
SIR J. S. COPLEY, 1826—1827 . . .		
SIR JOHN LEACH, 1818—1827 . . .		<i>Vice-Chancellor.</i>

---

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SIR CHARLES ABBOTT, 1818—1832. . .		<i>Chief Justice.</i>
SIR JOHN BAYLEY, 1808—1830 . . .	}	<i>Judges.</i>
SIR G. S. HOLROYD, 1816—1828 . . .		
SIR W. D. BEST, 1818—1824 . . .		
SIR JOSEPH LITLEDALE, 1824—1841 . . .		

† Created Earl of Eldon July 6, 1821.

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LORD GIFFORD, 1824 . . .	
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SIR JAMES ALAN PARK, 1816—1838 . . .	} <i>Judges.</i>
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SIR RICHARD RICHARDS, 1817—1824 . . .	} <i>Chief Barons.</i>
SIR WILLIAM ALEXANDER, 1824—1831 . . .	
SIR ROBERT GRAHAM, 1800—1827 . . .	} <i>Barons.</i>
SIR GEORGE WOOD, 1807—1823 . . .	
SIR WILLIAM GARROW, 1817—1832 . . .	
SIR JOHN HULLOCK, 1823—1829 . . .	

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SIR ROBERT GIFFORD, 1819—1824 . . .	} <i>Attorneys-General.</i>
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SIR J. S. COPLEY, 1819—1824 . . .	} <i>Solicitors-General.</i>
SIR CHARLES WETHERELL, 1824—1826 . . .	
SIR N. C. TINDAL, 1826—1829 . . .	

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# The Revised Reports.

VOL. XXVI.

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CHANCERY.

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## WELLESLEY v. DUKE OF BEAUFORT.

(2 Russ. 1—44; S. C. 5 L. J. Ch. 85.)

Jurisdiction of the Court to control the legal rights of a father over his children, on the ground of his immoral conduct.

[THIS case was affirmed in 1828 on appeal to the House of Lords under the title of *Wellesley v. Wellesley*, as reported in 2 Bligh (N. S.) 124, and in 1 Dow & Clarke, 152. Such passages of Lord ELDON's judgment (reported in 2 Russ.) as are of general interest will be found in the report to be given of the hearing before the House of Lords in a later volume of the Revised Reports. Other proceedings in 1831 in the same suit, against the principal defendant, by way of attachment for contempt, are reported in 2 Russ. & Mylne, 639. Those proceedings are usually cited under the distinctive title of "*Wellesley's case*," and will be reported in their proper place.—O. A. S.]

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ELDON, L. C.  
[ 1 ]

# ATTORNEY-GENERAL *v.* CORPORATION OF EXETER.

(2 Russ. 45—55; Rehearing 3 Russ. 395—399.)

1826.  
March 10, 11.  
Lord  
ELDON, L.C.

Rehearing,  
1827.

June 25.

Oct. 30.

Nov. 13.

Lord  
LYNDHURST,  
L.C.

[ 45 ]

Where trustees of a charity, under an instrument of doubtful construction, have acted honestly, though erroneously, they will not be charged in respect of past misapplication of the funds.

Reluctance of the Court to compel a corporation to make a discovery of the property which they possess applicable to general corporate purposes.

In the reign of Henry VII., lands were given to the corporation of Exeter and their successors, for the aid and relief of the poor citizens and inhabitants of Exeter, "who are heavily burthened by fee-farm rents of that city, and other impositions and talliages:" The rents ought to be applied to the relief only of such poor inhabitants of Exeter as do not receive parish relief. Lord ELDON doubting.

It is not a due administration of such a charity to apply the rents to the payment of fee-farm rents due from the city, repairing the gaol, maintaining the prisoners, and other public purposes.

NOTE.—Another case between the same parties is reported *post*, p. 105, under the distinctive title of *Attorney-General v. Mayor of Exeter*.

In the reign of Henry VII., an estate in the county of Devon was conveyed to the Mayor, Bailiffs, and Commonalty of the city of Exeter, and their successors, for ever, "in subsidium et relevamen inopie pauperum civium et inhabitantium civitatis predictæ, qui multociens graviter onerati existunt, tam per feodi firmas ejusdem civitatis Domino Regi et aliis annuatim persolvendas, quam per alias impositiones et tallagia dicti Domini Regis, cum per totum regnum Angliæ currere contigerit,† et ad inveniendum quendam idoneum capellanum \*annuatim Divina celebraturum in capella Sancti Georgii, in civitate predicta." The information, filed in 1821, complained of the misapplication of the rents and profits of this estate.

† The relators and the defendants did not agree in their translation of these words. In the information they were translated "to the aid and relief from want of poor citizens and inhabitants of his Majesty's aforesaid city, who were grievously burthened as well by fee-farms of the same to his Majesty and others payable, as by other imposts and taxes to his Majesty when such were imposed throughout the realm of England."

In the answer they were translated, "in aid and relief of the want of poor citizens and inhabitants of Exeter, who very often were grievously burthened as well by the fee-farms of the city, payable to our lord the King, and to others yearly, as by the impositions and taxes of our said lord the King, when he shall happen to make his progress through his whole kingdom of England." [The former translation seems right. F. P.]

[ \*46 ]

The corporation in their answer alleged that, at the period when this grant was made, there were annually payable by the city of Exeter two fee-farm rents, one of 20*l.* to the Crown, and another of 25*l.* 12*s.* 6*d.* to the convent of the Holy Trinity in London, which had since been reduced to 16*l.* 7*s.* 8*d.*, and 20*l.* 15*s.* 4*d.* respectively; that they and their predecessors had applied the rents and profits of this estate, as far as they would extend, towards the payment of such fee-farm rents, the support and maintenance of the prisoners confined in the city gaol, the cost of repairing the building, the payment of the salary of the keeper, and the expenses of entertaining the Judges at the assizes. They insisted that, in so doing, they had fulfilled the objects of the grant, inasmuch as the fee-farm rents were expressly mentioned in the deed, and the application of the fund to the other public purposes stated in the answer was in aid and relief of the poor citizens and inhabitants, who would otherwise have been subject to the payment of those expenses, by means of a county rate or other public assessment. They further alleged that the Corporation had at different periods applied the rents and profits of the estate towards defraying the expenses occasioned by the visits of the Kings of England, at different periods, to the city of Exeter, and to other public purposes; and, as to that part of the trust which related to finding a chaplain to celebrate divine service in the chapel of St. George, they stated that the chapel, being in a very dilapidated condition, was, in the year \*1598, taken down, and the site employed in enlarging the Guildhall of the city.

[ \*47 ]

The lands were let on leases for lives, granted upon the payment of fines, and subject to small reserved rents, amounting in the whole to 7*l.* 3*s.* 2*d.* The last renewals had taken place about sixteen years before the filing of the information. The Corporation had not kept any distinct accounts of the rents and profits of the lands of this charity, but had mixed them with their general funds.

The cause was heard before the Vice-Chancellor Leach on the 18th of February, 1825. The decree, which was then pronounced, declared, that the rents and profits of the charity estate in question “were then applicable in aid and relief of the

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poor citizens and inhabitants of the city of Exeter not receiving parish relief, and in providing a fit chaplain for celebrating divine service in the chapel of St. George the Martyr in the city, if such chapel be in existence." Then, after directing various inquiries concerning the charity lands, and the mode in which they were let, it ordered, "that the Master should inquire in what manner, and for what purposes, the several fines received by the mayor, bailiffs, and commonalty of the city of Exeter, upon the last grants or renewals of the several leases of the charity estate were applied by them: and it was ordered, that the Master should also inquire and state to the Court, whether the mayor, bailiffs, and commonalty of the city of Exeter have any, and what property, real or personal, which is applicable to general corporate purposes; and the Master was to be at liberty, as to such property, to state any circumstances specially at the request of either party; and for the better discovery of the matters aforesaid, the parties were to produce before the Master, upon oath, all books, papers, and writings, in their custody and power, relating thereto," &c.

From this decree the defendants appealed.

[ 48 ]

The *Solicitor-General*, Mr. Sugden, and Mr. Merivale, for the appellants :

The gift is for the aid and relief, not of the poor inhabitants of Exeter generally, but of the poor inhabitants who were heavily burdened by the payment of fee-farm rents, impositions, and talliages. It is therefore a trust, not so much for a particular class of persons, as for particular purposes, namely, the payment of these charges. \* \* \*

If it shall be decided that the profits of these estates have not been properly applied in time past, yet the application which is directed by the decree, is not according to the expressed intention of the donor. The gift is for the aid and relief of the poor citizens and inhabitants of Exeter; the decree confines the benefit only to such of the poor citizens and inhabitants as do not receive parish relief. Parish rates did not exist when this donor lived: and it cannot be right to limit the extent of his bounty by a qualification referring to a system of regulations

which did not arise till a century after his death. \* \* The distress of the poor cannot be relieved from any extrinsic source, without a diminution of the burdens of the rich.

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The mode of administering the charity with which this information quarrels, has gone on unquestioned for centuries. The Corporation cannot be blamed for treading in the footsteps of their predecessors. If they have acted mistakenly, they have not acted corruptly; and even if the future administration of the charity should be altered, no retrospective account ought to be directed: much less should the Corporation be compelled to make a full discovery of their property and of their titles to different parts of it.

*Mr. Agar, Mr. Duckworth, and Mr. Girdlestone, jun.* for the respondents:

\* \* If the rents were to be applied for the benefit of the poor indiscriminately, the effect would be, that they would be expended principally on parish paupers, in ease of the poor's rates. Such an administration of the property, though in form an aid to the poor, would, in truth, be an aid to the rich; for the ultimate benefit would be enjoyed by that class of persons who contribute most to the poor's rates.

[ 50 ]

At the very least, the fines received on the last renewals must be accounted for. The Corporation has not explained how they were expended; and if they cannot be made available, the charity will be left without funds till the present leases expire. This renders it necessary to ascertain what property the Corporation possesses, applicable to general corporate purposes, in order that the Court may see, whether there is any fund out of which payment can be ordered of what shall be found due to the charity.

In the progress of the argument, the Lord Chancellor ELDON made the following observations:

Where there is a trust of a charitable nature, and it is matter of difficulty to know the exact meaning of the instruments creating it, or to determine who are the cestuis que trust, it has never been the habit of this Court to call on those who have for

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[ \*51 ]

a long time acted in the management of the trust mistakenly, and not corruptly, to account for what passed before the filing of the information. The hardship of the contrary rule would be extreme. According to the old mode of proceeding, as \*soon as the answer set out the trusts, and the instruments under which the property was holden, the *Attorney-General* would, by amendment, have put his construction of them upon the record, and would have claimed an application of the funds according to that construction. Ultimately, the Court might have been of opinion that his construction was not the right one, any more than that which had been acted upon by the trustees. In such a case, would it not be monstrous, if the trustees had applied the money to public purposes, and not to their own private advantage, that they should be called upon to account for all the past time, though the King's officer, who sued them, was unable to tell them what they ought to have done?

It would not be difficult to find charters of the age of Henry VII. in which the whole inhabitants of a city like Exeter are described as *pauperes cives*. This gift could not originally have been meant for the poor not receiving parish relief; for at that time there were no poor receiving parish relief. The construction which the VICE-CHANCELLOR has put upon the deed, is a construction which the *Attorney-General* has not put upon it; for, though the grants are set forth by the answer, the *Attorney-General* has not thought fit to amend his information so as to disclose the construction for which he contends. It would be very hard on the citizens of Exeter to require them to construe those difficult words, which his Majesty's *Attorney-General* has not ventured to construe.

[ \*52 ]

Is it meant to be said that there are not many decrees of this Court, in which gifts to the poor have been carried into effect, without qualifying the objects of the charity by such a reference to parochial relief as I find in the judgment now appealed from? Is it to be laid \*down as a rule, that in future this Court is never to distribute a fund given to the poor, except among such poor as do not receive parish relief? There may be a highly meritorious individual receiving parish relief: why may not that charity be well bestowed, which adds something to the pittance

which he derives from the rates? Why may not that something be added, without diminishing the sum which he receives from the parish? It is said, that, where a charity fund is given to persons who receive parochial relief, it is applied in exoneration of the rich, who contribute to the public burdens of the parish. I say, that is not so. There may be many cases in which there cannot be a more prudent application of a charity fund than by giving it to those who are receiving parish relief; not thereby exonerating the rich from contributing to the relief of the poor, but adding to the relief, which the law has provided, further relief, which the rich are not bound to afford. There are many charities which are applied to the relief of persons who receive parochial aid; and if it is to be laid down, that a grant for the benefit of poor citizens and inhabitants is not to be administered so as to afford aid to persons chargeable to the parish, I cannot tell how many charities will be disturbed and thrown into confusion.

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THE LORD CHANCELLOR :

Mar. 11.

It appears to me that the meaning of the words, on which the question arises, is, that the grant was to be applied for the relief of that distress which was occasioned to the poor citizens and inhabitants of Exeter, by reason of their being frequently burdened by the payment of fee-farm rents, and of the impositions and talliages which are mentioned. As to the fee-farm rents, I cannot conceive \*that there should have been any apportionment of their amount among the individuals liable to pay them, by means of which the profits of these lands could have been applied to the discharge of that portion only of the fee-farm rents which would have been borne by the poor inhabitants. If a fee-farm rent was chargeable on the whole of the place called Exeter, he who was entitled to the rent might have demanded the whole, or any part of it, from any one who had a part of or in that city; leaving the person, who was thus called upon to pay, to obtain contributions from the other inhabitants as he best could. Then, the city of Exeter becoming the owner of certain lands for the purposes I have mentioned, would it not have been bound to pay the fee-farm rents in

[ \*53 ]



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discharge of the whole community, thereby relieving those poor inhabitants who might either have been called upon to pay in the first instance, or fixed by contributions afterwards?

The talliages and impositions, too, fell frequently on poor persons; though it appears there was a way known either to the law, or to the benevolence of the Crown, by which individuals, who were charged beyond their means, might obtain relief.

I find, therefore, two difficulties with respect to this decree.

[ \*54 ]

First, am I to take it for granted that no part of this property can be rendered applicable to the purposes for which it was originally given? Secondly, if no part of it can be rendered applicable to those purposes, is it to be laid down as a general principle, that no part of the property devoted to such a charity is to be applied for the benefit of persons receiving parish relief? As to the latter point, I must again state, for reasons I have \*already mentioned, that I cannot admit it to be true, that giving a portion of a charity to persons receiving parochial aid is relieving the rich. Many cases, I repeat, have occurred in this Court, in which persons receiving parish relief have been further relieved in this Court, by being allowed to participate in the funds of a charity. That participation may be such as neither to relieve the rich nor affect the rates. As to the other point, if it can be shown that any of these fee-farm rents are payable at this day, an inquiry ought to have been directed to ascertain whether any such fee-farm rents are existing, and on what property they were and are chargeable? Such an inquiry seems necessary, in order that it may be decided, whether any portion of the rents of the lands should be applied in discharging the fee-farm rents.

With respect to the general principle on which the Court deals with trustees of a charity, though it holds a strict hand over them, when there is wilful misapplication, it will not press severely upon them, where it sees nothing but mistake. It often happens, from the nature of the instruments creating the trust, that there is great difficulty in determining how the funds of a charity ought to be administered. If the administration of the funds, though mistaken, has been honest, and unconnected with any corrupt purpose, the Court, while it directs for the future,

refuses to visit with punishment what has been done in time past. To act on any other principle would be to deter all prudent persons from becoming trustees of charities. The inquiries, therefore, as to the rents and fines of the charity lands, must be without prejudice; and it must not be understood that they are directed for the purpose of charging the Corporation in respect of past application.

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[ 55 ]

The Court is not ignorant of the means of enforcing a decree against a Corporation. But I entertain great hesitation in giving my assent to an order calling upon a corporation or an individual to expose to the world the particulars of their property, and the purposes to which it is applicable; especially when such an order is accompanied, as in the present case, with a direction to produce deeds and papers. The result of the other inquiries may be, that the corporation is not chargeable to the extent of a single shilling; so that the disclosure may be altogether unnecessary for the purposes of this suit, and yet might be prejudicial to the defendants in other points of view. That part of the decree cannot stand.

Though Lord ELDON had expressed his opinion on the different points which were discussed, judgment had not been formally pronounced when he resigned the Great Seal. The cause was, therefore, re-argued before Lord Lyndhurst.

1827.  
June 25.

[ 3 Russ. 395 ]

The arguments were to the same effect as before.

THE LORD CHANCELLOR:

[ 396 ]

The only question which was argued upon this appeal, was, as to that part of the decree which orders and directs in what manner the rents and profits of the estate in question are now applicable. The purposes, to which, it appears, these rents, mixed up with other funds of the corporation, have hitherto been applied, are not, I think, authorised by the terms of the grant. The defendants state, that certain fee farm rents have been paid, and that certain public expenses have been defrayed from this fund, the latter of which must otherwise have been raised by public levies and impositions. But the defraying of these charges and expenses does not, I think, fulfil the intention of the donor. The estate does not appear to have been given

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for that purpose. It was given to relieve the wants of the poor. It is true, the poor are described as greatly oppressed by these charges and impositions. But the payment of them, except so far as they fall upon the poor, cannot on that account be considered as a fulfilment of the object of the charity, which was intended exclusively for the poor, and not to be shared by, or applied for the benefit of, the rich. The principle of these observations will apply equally to the fee farm rents, the expenses of the gaol, and, in general, to the other objects upon which the rents and profits are stated to have been employed.

Viewing the subject in this light, I do not see in what manner the intention of the grantor could be better effected, than by the decree as pronounced by the late VICE-CHANCELLOR. If the rents and profits are applied in paying such expenses as would fall upon the county rate, or be defrayed by any other public tax or contribution, they would be applied in aid of the rich, as well as of the poor, and in a much larger proportion in favour of the former than of the latter. I have stated, \*that I consider such an application of them as inconsistent with the declared object of the founder of the charity. If they were given in support of the poor, who receive parish relief, they would in like manner be applied in aid of the rich. It seems, therefore, that the best mode of administering that portion of this fund which is applicable to the poor, so as to give effect to the intention of the founder, will be, to employ it in aid of the poor citizens and inhabitants of Exeter, not receiving parish relief.

It is true, that this appropriation of it may have the effect of preventing some individuals from applying for relief, who, without such assistance, might be under the necessity of doing so; and that thus, indirectly, the benefit of the fund may be shared in a degree by the rich: but this is a contingent effect which cannot be avoided; and, after looking at the subject in the different views in which it has presented itself to my consideration, I cannot suggest any better mode of giving effect to the object of the grant, than by declaring the rents and profits of the estate to be applicable to the purposes pointed out in the decree of the late VICE-CHANCELLOR. It was not disputed, that the inquiries as to the chapel were properly referred

[ \*397 ]

to the Master ; and the question, which I have considered, being the only point upon which any objection was made, the decree should, I think, be affirmed.

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Nov. 13.  
—

The decree having been affirmed on the principal point, a question was raised by the plaintiffs, with respect to those parts of the decree which directed the Master to inquire how the fines, received upon the last renewals of the leases of the estate, had been applied, and whether the corporation possessed any property applicable to general corporate purposes.

*Sir Charles Wetherell and Mr. Sugden, for the Corporation :*

[ 398 ]

A general inquiry into the property of a corporation, accompanied, as it is here, with directions which will compel the defendants to produce all their title deeds, must be oppressive, and may work great injustice. What is there to call for such an inquiry here ? It can only be intended to ascertain what funds there are, out of which compensation to some amount may be made to this charity, for the partial misapplication of its funds. But that misapplication is admitted not to have been corrupt ; the monies were expended on objects of public utility : the fines, received upon the last renewals, have been applied in the same manner ; and, therefore, inquiry with respect to them is superfluous.

*Mr. Agar, contra :*

The charity lands have been let on leases which are subsisting ; and unless the fines, which were paid when those leases were granted, be accounted for, the charity will be without any income till those leases expire. There is no evidence how these fines were actually expended. The inquiry into the property of the corporation is necessary, in order that the Court may see, whether they are in possession of funds, not affected by charitable trusts, out of which the balance can be paid, which in this suit must be found to be due from them.

THE LORD CHANCELLOR :

That part of the decree which directs an inquiry into the

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property of the Corporation, and relates to the production of their title deeds, must be omitted. If there were any evidence that the fines paid on the last renewals had been applied to the public and corporate purposes which have been mentioned, I would not direct any \*inquiry respecting them. But I have no such evidence. I cannot say that there is no part of those fines still remaining on the lands of the corporation, and, therefore, that inquiry must be directed.

1826.  
Feb. 25.  
Mar. 3, 14.

### NEROT v. BURNAND.

(2 Russ. 56—59.)

Lord  
ELDON, L.C.  
[ 56 ]

The taking of an account will not be stayed pending an appeal. It is not the habit of the Court to direct security to be given for the result of an account.

Pending an appeal, the Court will sometimes stay the sale of property which the decree has directed to be sold.

THE object of this bill was, to obtain a declaration that the plaintiff had for a certain number of years been partner with his sister, the wife of the defendant Burnand, in carrying on an hotel, and that the partnership was dissolved, and to have the partnership accounts taken, and the property sold. The defendant denied that the plaintiff was a partner, and insisted that she had carried on the concern solely on her own account. She was in the occupation of the hotel, in the enjoyment of the business, and in the possession of the property with which it was carried on.

The VICE-CHANCELLOR had pronounced a decree in favour of the plaintiff, which directed the property to be sold. The defendant appealed. A motion was made to stay the proceedings under the decree, until the appeal was heard. \* \* \*

[ 57 ] *Mr. Hart and Mr. Roupell* in support of the motion. \* \* \*

*Mr. Heald and Mr. Barber* for the plaintiff. \* \* \*

[ 58 ] THE LORD CHANCELLOR :

There is no ground for the application, so far as it relates to taking the accounts. Generally speaking, the Court never stays

the account ; nor does it direct security to be given for the result of an account. That result is entirely speculative ; the Master could not ascertain it, and would be obliged to guess at it.

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The proceedings directed by the decree ought to be stayed ; but ample security must be given for the value of the property directed to be sold ; such as the furniture, plate, wines, &c.

\* \* \* \* \*

### KERSHAW v. MATTHEWS.

(2 Russ. 62.)

1826.  
Mar. 14, 15.

Lord  
ELDON, L.C.  
[ 62 ]

Where a partner has a right to appoint a person to succeed, upon his death, to his share of the business, and the person so appointed refuses to accept that share, or to comply with the stipulations of the articles, the partnership is dissolved ; but the dissolution is not a dissolution which is wrought by the exclusion of the appointee by the surviving partners.

THE residuary legatee of a deceased partner claimed, under some clauses of the partnership deed, to be admitted a partner, or to have it declared that the partnership was dissolved.

*Mr. Horne* and *Mr. Knight* moved, on his behalf, for a receiver.

*Mr. Sugden* and *Mr. Wigram*, *contrà*.

THE LORD CHANCELLOR :

If there is a partnership carried on under articles which stipulate, that, upon the death of a partner, he shall be succeeded in the business either by some person whom he shall appoint, or by his executors, it may happen that his appointees or his executors do not think proper to come into his place on the same terms on which he was a partner in the concern. In that case, the death of the partner puts an end to the partnership.

The stipulation may be, that the appointee or executor of the deceased partner is to be a partner, only if he does this or that particular thing. If the executor or appointee refuses to comply with the proviso, the whole concern must be wound up. But the dissolution which takes place is not a dissolution wrought by the exclusion of the executor or appointee ; for he never becomes a partner.

1826.  
May 8.  
June 20.

Lord  
ELDON, L.C.  
[ 114 ]

JOHN LESLIE *v.* ALEXANDER BIRNIE AND OTHERS.

(2 Russ. 114—120.)

Where persons, who were merely hirers and occupiers of seats or pews in a dissenting meeting-house, which was held in trust for the use of the congregation, but who did not take the sacrament there, had been excluded from voting at the election of a minister to officiate in the meeting-house, an application for an injunction to restrain the individual so elected from acting as minister, or receiving the emoluments attached to his office, was refused.

By letters patent, bearing date on the 9th day of October, 1769, King George III. demised a certain piece of ground, with the chapel, vestry room, and galleries on the same, situate in Swallow Street, to James Blyth, John Hardie, and Samuel Short (the elders of the chapel), and the survivors and survivor of them, and the executors and administrators of such survivor, in trust, for the use and benefit of the congregation of the chapel, for a term of thirty-nine years and a half, commencing from the 5th of April, 1779, at the yearly rent of 8*l.*, payable to his Majesty, his heirs, and successors.

In 1800, the old lease was surrendered; and the Crown granted a new lease of the chapel to the then ministers and elders of the congregation, their successors and assigns, for the term of ninety-nine years, but without any express declaration of trust.

The chapel had been all along used by the ministers, elders, members, and seat-holders, forming a church or congregation, professing the doctrine, and observing and conforming to the ritual and discipline of the Established Church of Scotland, so far as such discipline was applicable \*to a Scotch church out of Scotland. By the members of the church were meant communicants, that is to say, such persons as received the sacrament from the minister officiating in the chapel, according to the ritual of the church of Scotland. The seat-holders were those, who, whether communicants or not, occupied pews and sittings in the chapel at a quarterly rent. The rents of the pews constituted the emoluments of the minister. The expenses of the repairs of the building, and of the celebration of divine service, were defrayed by voluntary contributions made from time to

[ \*115 ]

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time at the church door. The congregation had always been in spiritual connection with an association called "The Presbytery of the Scotch Church in London," which was composed of ministers of Scotch churches in and near London, and of one or more elders from each of these churches.

In 1825, a vacancy in the office of minister having taken place, an election ensued, at which only members of the church were permitted to vote; although the plaintiff, who was, and had long been, a seat-holder, but was not a member, and many other persons belonging to the congregation, had previously insisted, that all seat-holders, whether communicants or not, were entitled to a voice in the election.

Mr. Woodrow was the sole candidate, and the choice fell on him. This proceeding was followed up by the steps usual in such cases among that class of dissenters. The Presbytery sustained the election, or call, of Mr. Woodrow, notwithstanding the opposition of the plaintiff and other seat-holders, and proceeded to give him the spiritual care of the congregation, according to their established forms.

The bill was filed against Mr. Woodrow and the elders of the church. It insisted that the seat-holders had a right to vote, and that, in consequence of their exclusion, the election was irregular and void. The prayer was, that the trusts of the lease might be declared and carried into execution; that it might be declared, that, under those trusts the seat-holders were entitled to vote in the choice of a minister; and that, in the mean time, Mr. Woodrow might be restrained from officiating as minister, and from receiving the revenues of the chapel.

[ 116 ]

The plaintiff moved for an injunction, according to the prayer of the bill. In his affidavit, filed in support of it, he stated, that, at the immediately preceding election, which took place in 1821, the seat-holders voted: but that assertion was denied by the affidavit of the elders.

*Mr. Sugden and Mr. Ching*, in support of the motion :

The existing lease must be held on the same trusts as the lease which was surrendered, and is, consequently, for the use of the congregation. It is not denied, that the seat-holders are part of



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[ 117 ] the congregation ; they are, therefore, cestuis que trust of the chapel, and must have a voice, as well as the other cestuis que trust, in managing its affairs, and determining to what purpose it shall be applied. \* \* The election being void, the Court must prevent it from being acted on. \* \* \*

The *Solicitor-General*, Mr. *Horne*, and Mr. *Pepys* for the elders :

[The plaintiff derives his title from the general trust of the chapel, and that trust has no concern with the question.] Who is qualified to be the minister of such a congregation, how the minister is to be chosen,—are matters depending entirely on the ecclesiastical discipline established among this class of dissenters: and it appears, from the conduct of both parties, that the Presbytery is the body to whom the decision appertains: for it was to the Presbytery that the present plaintiff made his first application, and it was only when he failed there, that he came hither by way of appeal. \* \* \*

[ 118 ] They who assert, that strangers to the church, by hiring, each of them, part of a pew for three months, become entitled to elect the minister, who is to officiate among the permanent body for perhaps half a century, have a position to maintain, the inherent extravagance and unreasonableness of which would require to be counterbalanced by strong extrinsic evidence.

Mr. *Blenman*, for Mr. *Woodrow*.

THE LORD CHANCELLOR :

[ \*119 ] It seems to be agreed on all hands, and there can be no doubt, that the existing lease (although there be a want of expression in it for that purpose) is clothed \*with the trust which attached upon the original lease, and that it is now held for the use and benefit of the congregation of the Scotch chapel in Swallow Street. The congregation consists of a minister, elders, members (by which word communicants are understood), and seat-holders: and it is argued, that, for that reason, the minister, who is to preach in the church, is to be elected by the elders, members, and seat-holders. That sounds very strong to the ear of an

Englishman. The persons composing this congregation may have a great deal of use and benefit from the chapel by hearing the sermons which are preached in it, though they have not all a voice in the election of the minister who is to preach to them. The trust is for the use of the congregation; but in what sense is it to be for their use?

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This Court has nothing to do with the voluntary subscriptions which may be paid to-day, and withheld to-morrow; its jurisdiction is founded only on its right to declare the trust of the chapel, and how the chapel is to be used. The trust of the chapel is, however, connected with the consideration of the exercise of a spiritual jurisdiction; and, the property being for the use of a Scotch congregation, we are led to the inquiry how the ministers of such congregations are usually appointed. We have to do, therefore, only with the fact, whether Mr. Woodrow has been appointed minister by the exercise of that spiritual jurisdiction which regulates such congregations.

Now, it would be going too far to say, that this gentleman has been so improperly elected, that the Court ought to prevent him from preaching in the chapel, when no objection is made to his doctrine or character. You cannot decide the right of the parties on this motion; the plaintiff may, if he can, make out at the hearing, that Mr. Woodrow is not entitled to the use of the church; but \*I do no harm by permitting him to preach in the mean time; especially as it is admitted, that, if the church were vacant, the person, who would preach in the interim, would not be selected by the plaintiff.

[ \*120 ]

*The motion was refused with costs.*

The plaintiff moved, that the motion for an injunction might be reheard; on the ground that, since it had been disposed of, he had discovered facts material to the question. The substance of the new evidence was, that the subscribers, as well as members, had concurred or taken a part in the appointment of a minister on three or four preceding occasions. The facts stated in the plaintiff's affidavit, were in some points explained away, and in others met by opposing facts, in an affidavit filed by some of the defendants.

June 20.

LESLIE  
v.  
BIRNIE.

*Mr. Sugden and Mr. Ching* submitted, that, upon the new state of the evidence, the Court ought to discharge the former order, and direct the motion to stand over and come on with the hearing of the cause.

*Mr. Horne, and Mr. Pepys, contra.*

The LORD CHANCELLOR observed, that the new evidence left the case in the same situation in which it was before. The trust was for the congregation. In one sense the "congregation" might be construed as composed of all who met together at the chapel; in a more limited sense, it might mean the members only. The trust might be well executed, if the minister was chosen according to the custom and laws of the Church of Scotland.

*The application was refused with costs.*

### BARKER v. RAYNER.

(5 Maddock, 208—218; affirm. 2 Russ. 122.)

1820.  
May 3.  
Dec. 6.  
LEACH, V.-C.  
On Appeal.  
1826.  
May 30.  
Aug. 1.  
Lord  
ELDON, L.C.  
[ 122 ]

A testator bequeaths all his right, title, and interest in two policies of insurance, which he had effected on the life of his wife, together with all benefit and advantage thereof, to his executors upon trust, after the death of his wife, to receive the amount of the policies, and thereout to pay or provide for certain legacies; his wife having died, he received the money, and invested it in securities, of which he continued possessed at his death: held, that the legacies failed.

In September, 1790, William Hammond effected, in the Equitable Insurance Office, a policy of insurance on his wife's life for 1,500*l.*, and, in September, 1795, another policy for 600*l.*; which sums were made payable to him, his executors, administrators, and assigns, within six months after her decease. In July, 1815, he made his will, by which he bequeathed unto his executors all his right, title, and interest in the two policies of insurance, &c. together with the said policies, and all benefit and advantage thereof, upon trust, to pay the premiums which should become due during the life of his wife, and two annuities of 20*l.* each; and, after the decease of his wife, to receive the money due on the policies, and to stand possessed thereof on

certain trusts. These were, to repay themselves, with interest, the money which they should have expended in the execution of his will; to pay 500*l.* to Mrs. Barker, or, if she were dead, to such of her children as might then be living; and to place out at interest the residue of the monies received under the policies, for the benefit of his brother and sister, Mr. and Mrs. Hammond, during their lives, and the life of the survivor, and, after the decease of the survivor, to \*call in the monies and divide them amongst five infants of the name of Hammond. The residue of his estate was given to Mrs. Barker.

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†  
RAYNER.

[ \*123 ]

Afterwards, Hammond, in April, 1816, assigned the two policies to Rayner, who was one of the executors named in his will, by way of security for a debt. In June, 1816, the wife died; and Hammond, having received the money due on the policies, paid off Rayner's debt, and invested the residue in securities, on which it remained placed out, till his death in July, 1817.

Upon a bill filed by the residuary legatee, the question was, whether the bequest to the Hammonds of the residue of the money produced by the policies, failed by the non-existence of the policies at the death of the testator.

Sir JOHN LEACH, V.-C., held that it did [fail, and delivered judgment as follows:]

THE VICE-CHANCELLOR :

Dec. 6.

The testator, at the making of his will, had effected certain policies of assurance on the life of his wife, and considering that his wife would survive him, and that the benefit of these policies would not accrue until after his death, he makes these policies of assurance the subject of gift or legacy by his will. It so happened that his wife died before him, and he received in his lifetime the amount of these policies, and the question in the cause is, whether the gift or legacy in his will is thereby adeemed? It cannot be contended, that in this case there was any such setting apart the money received, in order that it might be specially preserved for the legatees, as would, upon the principles of the civil law, prevent ademption. But it is said, that the specific character of the gift here failed only by the accident of

[ 5 Maddock,  
216 ]

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[ \*217 ]

the death of the wife in the life-time of the testator, and that the receipt of the money by the testator was the unavoidable consequence of that accident, and not *animus adimendi* the legacy, and that within the principle of *Hambling v. Lyster*,† and the other cases of that class, the legacy is not therefore adeemed. As a general principle, it is unquestionably to be stated, that if the subject of a gift do not remain *in specie* at the death of the testator, the gift is gone. \*But it must be admitted, that in *Hambling v. Lyster*, and in some other cases, there is authority for stating, that if there be a legacy of a debt, and that debt be afterwards received by the testator, that the legacy shall still carry the amount of the debt from the general assets of the testator, unless the testator appears to have called in the debt, with the intention to adeem the legacy. Some of those cases are, however, to be resolved by a different principle; that they were not considered to be specific legacies, but were, what are called in the civil law, demonstrative legacies; that is, general pecuniary legacies, with a particular security. In the case of *Ashburner v. Macquire*,‡ Lord THURLOW entered very fully into the consideration of all the cases which are to be found upon this subject; and in that case, and still more unequivocally, in the case of *Stanley v. Potter*, in Mr. Cox's Reports, § he altogether repudiated the principle of the *animus adimendi*, as tending to inexplicable confusion; and held, that when it was once determined that the legacy of a debt was specific, and not demonstrative, that the only safe and clear way was to adhere to the plain rule,—that there is an end of a specific gift, if the specific thing do not exist at the testator's death. It may be questionable from the cases of *Coleman v. Coleman* (2 Ves. J. 639), and *Roberts v. Pocock* (4 Ves. 150), whether Lord ROSSLYN fully adopted the principle of Lord THURLOW; but the cases of *Fryer v. Morris*,|| and *Le Grice v. Finch*,¶ before Sir WILLIAM GRANT, appear to me to manifest, by necessary inference, that that learned Judge considered the law to be so settled. Taking it, therefore, as an established principle, that in the case of a

† 9 R. R. 191 (13 Ves. 336 n.).

‡ Ambl. 401.

§ 2 R. R. 26 (2 Cox, 180).

|| 7 R. R. 222 (9 Ves. 360).

¶ 17 R. R. 10 (3 Mer. 51).

specific gift, the Court is only to inquire \*whether the specific thing remains at the death of the testator; and cannot enter into the consideration, whether it has or not ceased to exist, by an intention to adeem on the part of the testator, it necessarily follows, that in the present case I am bound to declare, that the legacy of the policies of assurance, being a specific gift, has altogether failed, by the non-existence of the policies at the death of the testator.

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v.  
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[ \*218 ]

The Hammonds appealed.

*Mr. Fonblanque and Mr. Bligh*, for the plaintiffs. \* \* \*

*Mr. Horne and Mr. Whitmarsh*, *contra*. \* \* \*

THE LORD CHANCELLOR :

If there be a gift of a sum of money, and the testator points to a fund, not for the purpose of giving that fund, but for the purpose of showing that the money to arise from that fund is to go to the legatee as money, the cases would authorise me to say, that, the intention being to give the money, the legatee is not to lose the benefit intended for him, even if the money should not remain in that fund; and its ceasing to remain in that fund would not amount to an ademption. In this particular case, a great deal will depend on whether it was the money that was given, connected with the policies by description, as the thing in respect of which it was to become due, or whether the policies themselves were the subject given: for, if the policies are not merely pointed out as the fund for the payment of the money, but are themselves the thing given, it will be difficult to make out, if the policies are gone, that the money is, nevertheless, well bequeathed.

1826.  
May 30.  
[ 2 Russell,  
125 ]

The LORD CHANCELLOR stated, that, upon a careful consideration of the will, he was of opinion, that the decree of the VICE-CHANCELLOR was right.

Aug. 1.

1826.

*May 23, 24.*

LEACH, V.-C.

On Appeal.

*May 30.**June 2, 8.*

Lord

ELDON, L.C.

[ 126 ]

## GRAY v. CHAPLIN.

(2 Russ. 126—149; 2 Sim. &amp; St. 267; 3 L. J. Ch. 47.)

The commissioners of a canal make an agreement for letting the tolls, not warranted by the Act under which they derive their authority, and prejudicial to an interest expressly reserved by the Act to the public: this agreement is acquiesced in for forty-seven years, without complaint on the part of any of the shareholders, and, during that period, the lessee remains in undisturbed possession of the tolls: the Court will not, at the suit of shareholders, disturb his possession by the appointment of a receiver.

Though the public interest could not be bound by the agreement, nor by the acquiescence of the shareholders and commissioners, it is not competent to shareholders to impeach that agreement in respect of such public interest.

How far the defective constitution of a suit, as to parties, is an objection to the appointment of a receiver.

THE Act of Parliament, passed in 1763, under which the Louth Canal was made, empowered the commissioners of that navigation to levy tolls not exceeding certain specified rates, and to grant leases of those tolls for any term not exceeding seven years. The funds thus raised were to be applied, after defraying incidental expenses, in the repayment of the money subscribed or lent for carrying the work into execution: and the Act declared, that, "when the money so advanced and lent, or a competent part thereof, shall be paid off, then the commissioners, or any nine or more of them, shall and may, and they are hereby authorised and empowered, with the consent of the major part of the creditors in value of the said tolls, to reduce the said tolls and duties."

About 27,500*l.* was raised, in shares of 100*l.*; the canal was made; and the tolls were fixed, and had ever since remained, at the highest rates permitted by the Act.

In 1770, Mr. Charles Chaplin, one of the commissioners, took a lease of the tolls for seven years. That lease expired at Midsummer, 1777; and, difficulty having been experienced in re-letting them, Mr. Charles Chaplin offered to take a lease of the canal for ninety-nine years, on certain terms. The commissioners accepted his proposal; and, on the 27th of October, 1777, the following \*memorandum of agreement between him and them was entered on their proceedings:

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CHAPLIN.

“Whereas public notice hath been twice given in the public newspapers, and at the several market towns mentioned in and pursuant to the directions of the Act, that a meeting would be held for letting the tolls of the river for seven years, and no one appearing at either of the said meetings to take the same; and whereas, at a subsequent adjourned meeting for that purpose, held on the 12th day of August last, Mr. Chaplin proposed to advance all the money necessary for the repairs of the river, and to keep the same in good and sufficient repair, subject to the order and directions of the commissioners for the time being for that purpose, and to keep down the interest on all the money borrowed, by paying to every subscriber interest after the rate of 5 per cent. per annum, by half-yearly payments, and to pay all officers' salaries, and all other expenses attending the said works, provided the commissioners invest him with proper powers, and assign the benefit of the tolls for a term of ninety-nine years, and agree to join with Mr. Chaplin in obtaining an Act of Parliament at his expense for confirming the agreement, whenever thereto by him required, which proposal was approved of and accepted by the greatest part of the subscribers at the meeting, and hath since been approved of and accepted by all the other subscribers, except Messrs. Alexander and Frishney Gunniss, and Mr. John Shaw; It is hereby ordered and agreed, for the good of the said navigation, and as the only method for raising the money necessary to put the same into proper and effectual repair, that the canal or cut, and the navigation thereof, subject to the orders of the commissioners as above mentioned respecting the same, together with all the tolls arising from the said navigation, and all the estate and interest of the said commissioners therein and \*thereto, shall be vested in the said Mr. Chaplin, his executors, administrators, and assigns, for a term of ninety-nine years, to commence from the 24th day of June then last; and Mr. Chaplin hereby agrees on his part to accept the trust, and to do all the works which shall be ordered to be done by the commissioners as above mentioned, for the support of the navigation, and from time to time to pay all the interest of the money borrowed, at the rate of 5 per cent. per annum, by half-yearly payments, every Midsummer and Christmas, with officers' salaries, &c., &c. And

[ \* 128 ]



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it is further ordered, that nine commissioners be appointed to enter into an agreement with Mr. Chaplin, in writing, to carry the said order into execution."

There was no other agreement in writing; no formal lease was made, nor was any Act of Parliament obtained; but, from that time, Charles Chaplin, and those who claimed under him, had been in the uninterrupted receipt of the tolls, had paid the interest, and had had the entire management of the canal.

Charles Chaplin died in 1795. The bill alleged, that, after all his debts and legacies were paid, a large residue, comprising, among other things, his interest in the Louth canal, and more than sufficient to answer what might be coming due from Charles Chaplin on account of the tolls received by him, remained in the hands of his executors, and was by them assigned and transferred to Thomas Chaplin, his residuary legatee; and that Thomas Chaplin died in 1804, having bequeathed all his estate and interest in the Louth navigation to Francis Chaplin and George Chaplin, and appointed them his executors.

[ \*129 ]

The bill was filed by two persons, holders, by assignment, of certain shares in the Louth navigation, on \*behalf of themselves and all the other shareholders, except the defendants, against Francis Chaplin, George Chaplin, and the acting commissioners. It alleged, that the sums derived from the tolls had, for a long series of years, been more than sufficient to pay the outgoings and the interest of the debt; that, if the surplus had been applied as it ought to have been, in the diminution of the capital of the debt, the whole of the debt charged upon the canal would have been by this time paid off, so that the tolls might have been reduced, and the benefit of the navigation given to the public at a cheaper rate; and that the commissioners had neglected to carry the purposes of the Act into execution, and had permitted the Chaplins to apply the surplus tolls to their own use. It prayed that the agreement and the assignment (if any was made) might be declared to be void as an absolute assignment, and to stand as a security only for payment of the interest of the shares, and of the expenses of the canal, and then of the principal of the shares; that an account might be taken of the tolls received

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by Charles Chaplin, Thomas Chaplin, and the defendants Francis Chaplin and George Chaplin, and of the sums expended by them in paying the interest of the shares and in repairing the canal; that, if any balance should appear to be in the hands of George Chaplin or Francis Chaplin, it might be paid over to such persons as the Court should direct; and that a receiver might be appointed to collect the tolls.

A general demurrer to the bill was over-ruled by the VICE-CHANCELLOR, [who said:]

In order to enable a plaintiff to sue on behalf of himself [ 2 Sim. & St. 272 ] and all others who stand in the same relation with him to the subject of the suit, it must appear that the relief sought by him is in its nature beneficial to all those whom he undertakes to represent. The several persons who advanced monies upon the credit of these tolls, must be taken to have advanced such monies in the confidence that the powers of management of the tolls, which were vested in the commissioners, would be duly exercised according to the directions of the Act; and a bill which has for its object the due exercise of those powers and to avoid a breach of trust, must be intended to be in its nature beneficial to every shareholder. I am of opinion, therefore, that the plaintiffs were entitled to file this bill on behalf of themselves and all other the shareholders who were not defendants.

Francis Chaplin and George Chaplin stated by their answers, [ 2 Russ. 129 ] that, in 1777, the canal being in a very ruinous \*condition, and, [ \*130 ] surveyors having reported that it would be necessary to expend 7,000*l.* in repairing it, the commissioners found themselves unable either to raise the money by loan or to let the tolls; that, with a view to the public benefit, Mr. Charles Chaplin, who had always been a zealous promoter of the undertaking, made the proposal mentioned in the bill, which, after much deliberation, and repeated meetings of the commissioners, was accepted and approved of on behalf of all the shareholders; \* \* \*

They did not admit the allegation that the executors of Charles Chaplin had assigned his interest in the canal to Thomas Chaplin, or that they were the executors of Thomas

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Chaplin. They stated, that Thomas Chaplin, having taken on himself the payment of the legacies of Charles Chaplin, had been permitted by the executors to enter into the possession of the canal; that he bequeathed to them, F. Chaplin and G. Chaplin, his interest in it, subject to charges in favour of various persons; and that he appointed certain other persons his executors.

The plaintiffs moved for a receiver.

A great majority of the shareholders disavowed the suit, and expressed their anxious desire that the agreement should not be disturbed.

The VICE-CHANCELLOR made an order, appointing a receiver, [saying:]

[ 132, n. ]

“The first objection urged on the part of the defendants is, that the lease in question is *not* a common injury to all the shareholders in this navigation, and, therefore, that the plaintiffs have no right to institute a suit on behalf of themselves and all other the shareholders. Now, I am of the same opinion which I expressed on the argument of the demurrer. This agreement for a lease is a common injury, and the release sought is a common benefit, to all the shareholders in this navigation. The shareholders have advanced their money upon the credit of an Act of Parliament, which, for their security, has provided certain trusts, and it is to be intended that they advanced their monies upon the faith that these trusts would be duly executed. It is therefore to be considered as for their common benefit, that those trusts should be duly executed.

[ \*133, n. ]

“Whether, under the particular circumstances of the present time, there may be individuals who would not desire to have those trusts executed, is quite another question. The injurious effect of this agreement to the shareholders is—that it necessarily locks up their capital for a term of ninety-nine years, at an interest of 5*l.* per cent.; whereas, under *\*the* trusts provided by the Act of Parliament, the tolls would be forming a daily fund for the payment of the capital. The locking up of the capital for the

term of ninety-nine years, *primâ facie*, is an injury. The affidavits, which have been filed upon the part of shareholders, disclaiming the suit, cannot receive any weight as to this objection.

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“The next objection is,—that the persons, who have filed the bill, are alleged by the answer to have been represented, in the year 1777, by some other persons who assented to the agreement; that they are as much bound by it, therefore, as if they themselves had been parties to it; and that, if parties to it, they would not have been permitted to file this bill.

“Now, in the first place, it is not distinctly stated in the answer, that the persons, through whom the plaintiffs derive their shares, assented to the agreement of 1777. There is, however, an allegation, that all the shareholders did concur in the measure. Of necessity, if all the shareholders concurred in that measure, those persons must have concurred in it, who possessed the shares which are now enjoyed by the plaintiffs. But it is only in this way that the thing is stated, by inference. I am of opinion, however, that if it had been distinctly made out, that the persons, who then enjoyed these shares, and who are now represented by the plaintiffs, had actually been parties to that measure, that would not have precluded those, who now hold the shares, from obtaining the relief which is the object of this bill.

“If the interest of the individual shareholders alone were concerned, whether those interests were derived from private contract, or whether they were derived from an Act of Parliament, it would equally be the principle of every court of justice, that, if all concurred in the contract, although not authorised by the Act of Parliament, they never could be permitted to disturb \*that contract. For, being a matter of private right, individuals are at liberty to deal as they please with those private rights; and, however imprudent and disadvantageous the bargain might have been, no Court could relieve them from a contract advisedly, though mistakenly, made. But that is not the case here. The contract here entered into is plainly a contract inconsistent with the public interest, and inconsistent with the duty of the commissioners. Parliament has given to these commissioners a

[ \*184, n. ]

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power of levying tolls and duties upon this navigation to the extent specified, and not beyond that extent. The Legislature has provided, out of the tolls and duties so to be received, for the payment of the interest of the monies borrowed; and then it has provided, out of the same tolls and duties, for the repayment of the capital. The capital might be wholly paid, or might be partly paid. If wholly paid, the commissioners have then an authority, at their pleasure, to reduce the tolls and duties entirely. If the capital is only partially paid off, then the commissioners have a power, with the consent of the majority of the shareholders remaining unpaid, to diminish those duties. Now, this object—the reducing the duties, which are to a certain extent a burthen to the public—is entirely defeated by the contract in question; because for the term of ninety-nine years, not one single shilling of duty can be reduced. This, therefore, is a case, in which private individuals, dealing with their own interest, cannot conclude a question of public interest; and the public have an interest in the avoidance of this contract, in respect of the possible diminution of the tolls: for the facts in this case go a great way to prove, that the monies borrowed would be paid off, if this Act\* were duly executed, and consequently that the duties would be reduced.

[ \*135, n. ]

“ If, therefore, it had been distinctly made out here, that these two plaintiffs now possess the shares, which were formerly enjoyed by A. and B., and that A. and B. had been express parties to this contract, I am of opinion it would not have justified the breach of trust in the commissioners in agreeing to this contract, and would not justify this Court in refusing now to direct, that the commissioners under this Act should execute the trusts reposed in them by it.”

[ 133 ]

The defendants, Francis Chaplin and George Chaplin, moved, before the Lord Chancellor, to discharge the order.

*Mr. Heald, Mr. Shadwell, and Mr. Fane* for the motion :

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Even if the interest of the public in the reduction of the tolls gives a right to impeach this agreement, still that is a right which the present plaintiffs cannot assert. Every interest and

right, which is in them, is bound by the agreement to which they were parties, or which they have adopted, and by their long acquiescence in it. If a public right is to be enforced, it must be at the suit of those to whom the protection of public rights belongs. \* \* \*

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If a fund is brought into Court, the representatives of Charles Chaplin and Thomas Chaplin may respectively have claims upon it. There is, therefore, a want of those parties, whose presence is necessary to enable the Court to do justice.

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In the course of the argument, the LORD CHANCELLOR made the following observations :

The difficulty, which in this case presses most on my mind, is, whether these plaintiffs can avail themselves of any such interest as the public may have to obtain relief against the defendants. Can a private individual complain, not on behalf of his own private interests, but of the public interest? Can he so complain, for the purpose of getting rid of an agreement by which, so far as his private interest is concerned, he would be bound? The shareholders agree with A. B., so as to bind themselves as between each other, and between each of them and A. B., that A. B. shall take all their interest in the tolls for ninety-nine years, he paying to them during that period 5*l.* on every 100*l.* subscribed. If they are \*proved to be parties to such an agreement, the question would be, whether, to the extent to which they had an interest in the canal, they could not so part with it? Suppose it made out, that the Chaplins had received as much as would have paid off the whole or a great part of the sum originally subscribed, the question would be, whether, as between the Chaplins and them, the Chaplins have not a right to retain that money? whether the effect of the agreement was not, that the Chaplins should stand in the place of the shareholders, as against the public, and take every thing that the shareholders could have taken?

[ \*138 ]

Independently of the question of public right, the case seems to me to be as hopeless a one as ever was thought of. If the shareholders knew that the commissioners had made this

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agreement, and have chosen to stand by for forty-seven years, they could not be permitted to maintain a suit here. Would not the Court say, "Whatever the *Attorney-General* may do, you, who have so conducted yourselves, shall not be plaintiffs in a court of equity" ?

*Mr. Hart, Mr. Sugden and Mr. Roupell*, in support of the order appointing a receiver :

[ 140 ]

\* \* The acquiescence of the parties may preclude them from having an account retrospectively, but it cannot bind them to submit in future. They have a right to say, "We have been in error for many years, but we have an interest in the due execution of the trusts of the Act of Parliament: the public, too, has an interest in them, which no contract or acquiescence can affect." \* \*

The future collection of the tolls is the only matter to which the appointment of a receiver refers; and, for that purpose, it is not necessary that the suit should be in so complete a state, that a decree could be made upon it, ascertaining and binding the rights of every person concerned. A receiver has frequently been appointed, where there was an alleged want of parties.

[ 141 ]

THE LORD CHANCELLOR :

The question is, whether, upon this bill (regard being had to the interest of the present plaintiffs, by which I mean their pecuniary interest, and to the state of the parties on this record), a receiver ought to be appointed? I have not to consider the question of what may be the result at the hearing, nor whether the time may not come, when, on a different state of things, the Court would appoint a receiver.

The Act of Parliament was passed in the year 1763, and it gave a power of letting the tolls for seven years, and no more. As that power was expressly limited to granting leases for seven years, it may be stated to be at least a matter of considerable doubt, whether an agreement to give a lease for a longer term in the tolls, when the lease of seven years actually made should expire, was an agreement that could be enforced; in other words, whether you could, by an actual demise, give a legal title for

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seven years, and, by an agreement for a longer lease, give an equitable title for seven years more, so as to make the interest, in one sense at least, a lease for fourteen years? In 1770, a lease for seven years was granted to Charles Chaplin; and he, during that period, was expending his own money, as is stated, in paying 4 per cent. to the holders of the shares. Now, the question as to the lease for seven years, is, in fact, not very different from the question as to the lease for ninety-nine years;† save that there was an authority to make a seven years' lease, which would bind the public; whereas, if the demise for ninety-nine years be a good demise at all, \*it certainly cannot be stated as a good demise against the public. It is, however, quite a different question, whether it be not a good demise against the individuals, who either made such a lease, or agreement for a lease, or acquiesced in it for such a period, as would induce a court of equity to say, "We will not interfere."

[ \*142 ]

The representation is, that, at the end of seven years, this canal was in so disastrous a condition, that there was very little hope of bringing it to that state of improvement in which it would answer the purposes for which the Act of Parliament had been procured, without incurring a greater expense than the persons then connected with it were able to furnish. Then a certain proposition was made, which, as far as individuals were concerned, it was quite competent for each shareholder to enter into, so far as regarded his own interest: and it is stated, that, in consequence of that proposition, the shareholders assented to the agreement, which this bill now seeks to impeach. Some individuals, it is clear, did expressly assent to it: but I use the word "shareholders" as applying to all; for, as to all, it is impossible to deny that there has been an acquiescence in the actual enjoyment of the property according to the agreement, from the year 1777 down to 1824.

Then, one very material question is, whether such an acquiescence for forty-seven years does or does not furnish an objec-

† The LORD CHANCELLOR here alludes to an agreement which was stated to have accompanied the first lease, and by which Charles Chaplin,

at the expiration of the first term of seven years, was to accept a further lease on certain terms.



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[ \*143 ]

tion to individuals coming here, for their individual interest, to disturb an enjoyment under that agreement, by the disturbance of which much evil may be inflicted on a family which has been so long acting on the faith of their acquiescence? It seems an extremely difficult thing to say, that this was an agreement, by which, however the parties might bind themselves, they could, under this Act of Parliament, at the same time bind \*the public; and I will take it for granted (without, however, giving a conclusive opinion), that they could not bind the public. Still, I conceive that, if, in 1777, looking at the interest which they respectively had in the tolls, with reference to which they had become subscribers to the undertaking, they entered into an agreement which bound their own interests with respect to each other, without prejudicing the public, it would be difficult to maintain, that, at the end of forty-seven years, they could complain of that agreement in a court of equity; particularly to the extent of taking away the possession from those who have so long enjoyed it, and taking away the possession upon a notion which admits that it may be fit to restore it to the same persons again.

If it is to be inferred, as against the Chaplins, that they must be assumed to have known the meaning of the Act of Parliament, so also is it to be inferred, that every other subscriber must have known the meaning of that Act.

[ \*144 ]

In that view of the matter, I conceive, that it was competent to the parties to make, or to acquiesce in, an agreement for forty-seven years, amounting to this: "We so think about the concern, that, if you will pay us, not the 4 per cent., which you have paid hitherto, and which has not yet been repaid to you from the tolls, but 5 per cent. till the expiration of the ninety-nine years, and take the tolls,—that is an agreement, which, as between you and us, we do not quarrel with." Each and every proprietor might have assigned his interest for ninety-nine years, agreeing, that, at the end of ninety-nine years, his capital of 100*l.* was or was not to be repaid. If a man were either an express party to such an agreement, or had been acquiescent in it for half a century, he would be \*told, that he was not to be relieved from it in a court of equity.

Assuming, then, that this Act of Parliament is to be so con-

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strued, that, after the shares of 100*l.* each were repaid to every subscriber, and 5*l.* per cent. interest on the capital paid to every one, it could be duly executed only by lowering or annihilating the tolls, for the benefit of the public, except so far as a further expenditure for future repairs might be wanting, still the question is, whether the instruments and the acquiescence do not amount to the same thing as if these parties had said, "You, Mr. Chaplin, shall be allowed to stand in the place of us all; you shall take our liabilities; you shall have all our rights; but when you take all our rights, we must inform you, that we cannot give you any rights as against the public." Then, putting the case in the strongest possible way, and supposing that it could be made out by an account to be hereafter taken, that the Chaplins have received from the tolls a sum sufficient, not only to reimburse themselves the 5 per cent. paid to subscribers, but all the expence of repairs of every kind, and as many hundreds of pounds as were equal to the capital subscribed, the question would be, not whether there was a demand on the part of the public for a reduction or annihilation of the tolls, but whether it was competent to those, who had contracted with the Chaplins, and had allowed them to have the possession of this property for forty-seven successive years uncomplained of, to set up any demand in a court of equity. If such a demand were set up, would it not be competent to Mr. Chaplin to say, "You gave me your interest in the canal for ninety-nine years, and if, in the course of forty-seven years it has produced to me the amount both of the principal of the 100*l.* shares, and the 5 per cent. interest upon them, the public may have a right to tell \*both you and me that we are all satisfied; but how can you, on the expiration of forty-seven years, call back from me what you agreed that I should possess for ninety-nine years?"

[ \*145 ]

I admit, there are cases in which the Court will appoint a receiver, though all the proper parties to the suit are not before it. But it is very difficult to do so at the inception of a cause, unless the transactions happen to be very simple: and, it is a difficult thing to say, that, at the end of forty-seven years, you will take away the possession from those who have had it so long, when you are not able to say what you are to do with the result

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of the account, with reference to the anticipated result of which the possession is to be so changed.

Now, what has been the actual enjoyment of this property? Charles Chaplin was the first who took possession of it; and there is no personal representative of him before the Court. With a view to get rid of that objection, there is in the bill a charge, that his representative had handed over the property to other persons of that name. But let it be recollected, that Charles Chaplin received the tolls from the year 1777 to 1795; and, if it be the duty of the Court to appoint a receiver immediately, it is also the duty of the Court to take care, that it, at least, have the means of immediately determining, whether the possession ought to be restored, and of displacing that receiver, if the possession shall turn out to have been disturbed improperly. Now, the answer denies, that the assets of Charles Chaplin were handed over in the manner alleged by the plaintiffs. Under these circumstances, I cannot see how we are to get on, those parties not being before the Court.

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Consider, too, what is the effect, in a court of equity, of long acquiescence in an agreement such as this; when parties come here, in 1824, to have an account of transactions between the years 1777 and 1795, in order to charge the assets of a deceased person, wherever they may happen to be found, with the result of that account, possessed and enjoyed, suffered to be possessed and enjoyed, as these assets have in the meantime been, by other parties. The difficulty does not stop there. Thomas Chaplin, the residuary legatee of Charles Chaplin, lived till the year 1804, and then disposed of this property as his own, having been led to think, by the acquiescence of these parties from 1777 to 1804, that he might so dispose of it. He bequeathed it in various proportions, to be enjoyed by different persons and families; and, from 1804 to 1824, a period of 20 years, they are left in the quiet possession of the property, without any objection being made, either on behalf of themselves or of the public, by any of those persons who now claim for their own private interest. Is this, then, a case, in which a receiver ought to be appointed in the first instance, regard being had to the fact, that it was quite competent to the shareholders to say to Chaplin, "We will

transfer to you all our interest in, and title to, the 100%. shares ; you shall stand in our place, and you and the public may deal together, as to the receipts of the tolls, in the same way as the public would have a right to deal with us, if no such agreement had been made : as to increasing or lessening, or fixing a reasonable rate of toll, you may deal with them as you think proper."

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CHAPLIN.

Let it be understood that I am not suggesting any difficulty, (if it shall turn out that Chaplin or his family have received so much as would have paid him, not only the interest, but the principal, of all the shares), as to whether he has any right to any further tolls on this \*navigation, or as to whether there may not be some one in the world who may call him to account. But I am stating the difficulty which presses upon my mind, when I am called upon to continue a receiver, at the instance, and to protect the private interest, of persons, who, during forty-seven years, have suffered this property to be enjoyed against their own alleged rights. Even if there had been no express agreement, the acquiescence of parties for so long a period is an acquiescence, at which this Court must look, at least, with such a degree of anxiety, as to take care not to disturb the possession, without being sure that it can restore it, (should the result show the necessity of so doing,) and that it has the means of determining speedily, whether the possession shall be restored or not.

[ \*147 ]

As the cause stands, there is a want of parties ; there is no person here to represent the public. Let us suppose, that the Chaplins have received so much, as, after the necessary expenditure upon the canal, to pay more than the principal and interest of the shares, the account ought to proceed upon such a record as will enable the judge to determine, who is to take out of Court the fund which the appointment of the receiver shall have brought into Court. If, on the other hand, the monies received by the Chaplins are not sufficient to pay the principal and interest of the shares, the account must be taken in such a way as to bind, not only the parties as to their private interest, but those, who standing behind them, have an interest in the due application of the tolls. Upon the whole, I have very great difficulty in bringing myself to think, that parties, suing for their private interest, can call upon me to appoint a receiver on

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CHAPLIN.  
[ 148 ]

their behalf, under such circumstances as exist here, and upon such a record as this.

If I had any person here to represent the public, I might perhaps take a different view of the question. But the case, as it stands, is one, in which the Court, the more it considers the matter, will find it the more difficult to say, that a receiver ought to be appointed, and that the possession ought to be taken from those, whose possession has been acquiesced in for forty-seven years.

\* \* \* \* \*

*June 8.*  
[ 149 ]

The LORD CHANCELLOR stated, on a subsequent day, that he remained of the same opinion on the subject as he had before expressed ; and he discharged the order appointing a receiver.

DAKIN *v.* COPE.

(2 Russ. 170—182.)†

By an agreement entered into with executors for the purchase of a leasehold public-house, and the goodwill and licences connected with it, the household furniture, stock in trade, and other effects upon the premises, were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th of September, 1821: the valuation was made, but on the 29th of September, the purchaser, alleging that there was a defect in the title to the leasehold, refused to perform his contract: the executors filed a bill for specific performance, but in the meantime remained in possession of the house, and carried on the business: Held,

That, though the executors were entitled to a decree for specific performance, and though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since September, 1821:

That he could not be compelled to take that portion of the stock in trade on the premises at the time of the decree, which was not there at the date of the agreement, but had been substituted for such parts of the old stock as had been consumed in the usual course of the business:

That the purchaser ought to be charged with rent, taxes, and other outgoings, paid by the executors since September, 1821, and with interest on the sums so paid by them:

That the purchaser was not entitled to any occupation-rent, or other allowance for the use of the house and furniture by the executors during the period that elapsed after the 29th of September, 1821:

In a proviso in a lease, that, in certain events, the lease shall cease and be void, and the lessor may re-enter, the term "void" means voidable at the option of the lessor.

By an indenture of lease, bearing date on the 15th of February, 1817, James Burke and Thomas Hensman, with the consent of Mr. and Mrs. Greaves, under whose marriage settlement they were trustees, demised a certain public-house in Birmingham to Joseph Dakin, his executors, administrators, and assigns, for a term of ten years, from the 28th of the preceding December, at a rent of 96*l.* 10*s.*, payable quarterly. Dakin covenanted to pay the rent, taxes, and assessments, and to keep in repair the windows, doors, shutters, locks, and all other parts of the premises. The indenture contained a proviso that, "if the rent should be in arrear, and there should be no sufficient distress for the same, or if the said Joseph Dakin should become insolvent, or if he should neglect or fail in the performance or

1824.  
Feb. 25.  
*Rolls Court.*

PLUMER,  
M.B.

On Appeal.

1826.

June 1.

Sept. 1.

1827.

April.

Lord  
ELDON, L.C.

[ 170 ]

† *Day v. Lühke* (1868) L. R. 5 Eq. 336, 343.

DAKIN  
v.  
COPE.

[ \*171 ]

observance of any or either of the covenants or agreements thereinbefore contained, which by him were to be performed or observed, then and from thenceforth the present demise or lease, and the covenant for quiet enjoyment thereafter \*contained, should wholly cease and be void, and James Burke and Thomas Hensman, their executors, administrators, or assigns should, or lawfully might, immediately or at any time after such breach, non-observance, or non-performance, enter into and upon the thereby demised premises, or any part thereof, in the name of the whole, and repossess, retain, and enjoy the same as of his and their former estate.

Joseph Dakin being dead, his executors, on the 29th of June, 1821, put up the leasehold public-house to auction, with the good will thereof, and the ale, wine, and spirit licences taken out in respect of it. By the conditions of sale, the household furniture, fixtures, brewing utensils, stock in trade, and other effects in and upon the premises, were to be taken by the purchaser at a valuation; and the purchase was to be completed, and possession delivered, on the 29th of September next.

Cope was declared the purchaser at the price of 260*l.*, and signed an agreement pursuant to the conditions of sale. On the 24th of September and the following days, the valuation was made; it amounted to 670*l.* 18*s.* 7*d.* On the 28th of September, after the valuation was finished, a female servant of the defendant was placed in the shop; and she and the defendant sold some small quantities of liquor, but did not continue to do so beyond that evening. On the following day, the executors resumed the conduct of the business.

[ \*172 ]

In the margin of the abstract of title delivered by the executors, was the following memorandum, in the handwriting of a clerk of their solicitor: "The lessors consent to waive all forfeiture or right of entry which may have accrued to them by reason of the insolvency of Mr. Dakin, and will join in the assignment \*to the purchaser." Accordingly, Burke and Hensman, and Mr. and Mrs. Greaves, were made parties to the assignment of the lease to Cope. Mrs. Greaves, however, refused to execute it, on the ground that it was not necessary for her to join in the assignment; but she stated, that she did not wish to take advantage

of the forfeiture of the lease, if any had been incurred, and she signed a receipt for the rent up to Michaelmas, 1821. The assignment was executed only by the executors; and, Cope having refused to accept it, and to pay the residue of the purchase money, they filed their bill against him for the specific performance of the contract.

DAKIN  
v.  
COPE.

The executors had continued to carry on the business in the public-house.

The defendant insisted, that he was not bound to accept the assignment unless the lessors joined in it, so as to protect him against any forfeiture which might have been incurred by the non-performance of the covenants in time past.

*Mr. Sugden and Mr. Lovatt, for the plaintiffs. \* \* \**

*Mr. Shadwell and Mr. Farrar, contrà. \* \* \**

[ 173 ]

THE MASTER OF THE ROLLS :†

1824.  
Feb. 25.  
[ \*174 ]

The objection to the performance of this contract rests upon two points. The defendant says, that Dakin \*died insolvent; and, further, that if the fact of his insolvency be established, the lease is absolutely void. On the other hand, the fact of the insolvency is denied; and it is said that the expressions used in the note on the abstract proceeded on a notion (which certainly has been erroneous), that, if Dakin did not leave assets sufficient to pay his debts, that circumstance would bring him within the description of being insolvent.

The defendant has left the alleged fact entirely on the implication arising from the marginal note on the abstract; and, as that note, accurately read, does not amount to an admission of any fact, there is, in truth, no evidence of Dakin's insolvency. On the other hand, there is no evidence to show that he was solvent. It would, however, have been very difficult for the plaintiffs to have proved that he was not insolvent. The alleged insolvency ought to have been established by some unequivocal act done in Dakin's lifetime. In this state of the evidence, if the fact had been material, I would have directed an inquiry.

† Sir Thomas Plumer.



DAKIN  
v.  
COPE.

The next question is on the construction of the lease. The proviso is, that, if the rent shall be in arrear, and there shall be no sufficient distress on the premises, or if Joseph Dakin shall become insolvent, or shall fail to perform any of the covenants, the lease shall cease and be void, and the lessors may re-enter. There would be very great inconvenience in holding, that the effect of such a proviso is to make the lease absolutely void in the cases specified. Upon the most trifling breach of covenant, —if, for instance, the rent should be unpaid a few hours beyond the prescribed time—the lease would be at an end; and though the parties should deal together for years afterwards, upon the faith of its being a subsisting lease, neither of them could set it up again. In *Doe v. \*Banks*,† the words were much stronger than those that are used here; and Mr. Justice BAILEY, in his judgment, refers to the 19th Eliz. c. 10, by which certain ecclesiastical leases are made void to all intents and purposes; and yet it has been frequently held, that such leases are good during the life of the person by whom they are made. Both on the reason of the thing, and on authority, I am of opinion that the effect of the proviso is to make the lease voidable, and not absolutely void.

[ \*175 ]

There must be a decree for specific performance; but I will not give costs, as the litigation has been in some measure occasioned by the marginal note on the abstract, and the acts of the plaintiffs' solicitors.

Sir THOMAS PLUMER died before the decree was drawn up: and the minutes of it were afterwards delivered out by Lord GIFFORD.

[The decree treated the business as having been carried on by the executors at the risk of the defendant since the day fixed for completion.]

[ 176 ]

From this decree the defendant appealed: insisting, by his petition of appeal, that, even if the plaintiffs were entitled to have the contract specifically performed, yet they ought to have been charged with an occupation rent of the premises, considered as a furnished public-house, for the period during which they

† 23 R. R. 318 (4 B. & Ald. 401).

had been in the occupation of it, and with the value of that part of the stock in trade which they had disposed of, and that he ought not to have been ordered to pay more than the balance which would remain, after deducting the amount, \*with which the plaintiffs ought to be thus charged, from the amount of the purchase-money and interest.

DAKIN  
v.  
COPE.

[ \*177 ]

*Mr. Shadwell* and *Mr. Rolfe*, in support of the appeal.

\* \* \*

*Mr. Sugden* and *Mr. Lovat*, *contrà* :

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\* \* If the plaintiffs are entitled to have the contract specifically performed, the property must be treated as the defendant's from the 29th of September, 1821, and he must be answerable for everything that has been fairly done to preserve the property from being deteriorated. The value of a public-house consists, in a great measure, of the good-will attached to it, and of the wine, beer, and spirit licences; if the premises had ceased to be used as a public-house, the trade and the licences would have been lost. It was necessary, therefore, to carry on the trade, in order to prevent the subject of the contract from perishing; and in the carrying on of the trade, there was necessarily implied the disposing of the old stock of liquors, and replacing them, from time to time, with new articles of the same kind. It is not the original contract, taken by itself, which throws upon the defendant the profit or loss of the trade and the existing stock, but the contract, taken in conjunction with the situation in which the property was placed by his refusal to fulfil his agreement, and the conduct which it was necessary to pursue, in order to prevent the subject of the contract from perishing in the mean time.

[ 179 ]

The LORD CHANCELLOR inquired, whether the vendors had given the purchaser notice that the trade would be carried on at his risk?

It was answered, that it did not appear that any such notice had been given; but that it was a notorious fact, and unquestionably well known to the purchaser, that the trade had been all along carried on in the public-house, and in the usual manner.

DAKIN  
v.  
COPE.  
[ \*180 ]

The LORD CHANCELLOR also inquired, whether cases had not occurred, in which, a lease of a farm having \*been sold, and the vendor, on the refusal of the purchaser to complete his contract, having abandoned the land, the Court, though the property had been greatly deteriorated in consequence of the cultivation not being duly maintained, had, nevertheless, compelled the purchaser to perform his contract, provided the duty had been thrown upon him of considering at the time, whether he would occupy the farm or not?

The counsel stated, subsequently, that they had not been able to find any such case, or any case bearing directly on the point.†

In the course of the argument, the LORD CHANCELLOR expressed considerable doubt with respect to the decision in *Doe v. Bancks*.

\* \* \* \* \*

1827.  
April.

His Lordship's final judgment was as follows :

This decision, in a moral view, appears to me perfectly just. But as far as it considers the trade which was carried on as the defendant's trade, and makes him liable for all the transactions of the trade, I think it cannot be supported. The bill seeks no such decree expressly : the counsel on both sides admitted that they \*could cite no precedent for a decree to this extent, where it was not part of the contract of purchase and sale, that, if the buyer did not pay and take possession according to the contract, he should be liable for all trading loss.

I think, therefore, that the decree must be so altered as to be rendered a decree for the principal and interest of the purchase money for the lease and licences ; for the principal and interest of the valuation of the household furniture, fixtures, brewing utensils, and effects—as to all which, other than the stock in trade, the petition of appeal does not complain. As to the stock in trade, I think the decree can only be for payment of principal and interest of such parts, if any, of the stock in trade valued, as can be delivered to the defendant, and for payment of what he

† See *Earl of Egmont v. Smith* (1877) 6 Ch. D. 469.

hath received (if any thing he hath received) for any part of the property, part of the stock in trade. I think, also, that the defendant must account for all sums of money, which the plaintiffs have laid out for rent, taxes, and other necessary outgoings of the house and premises since the 29th September, 1821, as directed by the decree, and that he should pay interest for such sums.

DAKIN  
v.  
COPE.

I think the defendant cannot be compelled to take the present stock in trade, which was not part of the stock in trade to be paid for according to the conditions of sale; and if that is to be taken to and paid for by the defendant, it must be by agreement.

I think the petition of appeal cannot be supported, as far as it seeks an allowance for an occupation-rent to be paid or allowed by the plaintiffs. As the decree asserts that the defendant ought to have taken possession, he cannot charge an occupation-rent against those who have possessed only by reason of his wrong-doing; \*whereas I think he ought to pay the rent, taxes, and outgoings, which they have been by his wrong-doing compelled to pay.

[ \*182 ]

The decree, therefore, must be varied, so as to introduce these alterations, and all necessary directions in consequence of them.

Let the deposit on the appeal be divided.

I have no right to consider whether a more beneficial result might or might not have been obtained, if the plaintiffs had allowed the defendant not to be required to accede to a specific performance, but had brought an action for non-performance.

1827.

June 10.

Lord  
LYNDHURST,  
L.C.  
[ 183 ]

CHATTERIS *v.* YOUNG.

(2 Russ. 183—185.)

A testator bequeathed to his daughter 50,000*l.*, of which 20,000*l.* was to be paid to her absolutely, and, as to the remaining 30,000*l.*, she was to receive the interest to her separate use during her life, and, after her death, the principal was to be paid to such person or persons as she might by her will appoint; and, after giving various other legacies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed, that all the specific and pecuniary legacies thereinbefore bequeathed should be paid to the respective legatees free of legacy duty: the daughter having died in his lifetime, he afterwards, by a codicil, "instead of the legacies given to her by my will, which are now lapsed," bequeathed to her husband 20,000*l.*: Held, that the husband was not entitled to have the 20,000*l.* paid to him free of legacy-duty.

WILLIAM CHATTERIS by his will bequeathed to his daughter, "Mary Young, wife of Robert Young, the sum of 50,000*l.*;" directing "20,000*l.*, part thereof, to be paid to her absolutely," and the remaining 30,000*l.* to be invested in the name of herself and two trustees, upon trust, to pay the dividends to her separate use during her life, and, after her death, to transfer the principal to such person or persons as she should by will appoint, and, in default of appointment, to his the testator's children, Elizabeth and William. After giving various other legacies, he bequeathed the residue of his personal estate to his daughters, Mrs. Young and Elizabeth Chatteris, and his son William, in equal shares; and he appointed Mrs. Young and her husband, with two other persons, his executrix and executors. "And I do hereby direct," continued the testator, "that all the specific and pecuniary legacies, hereinbefore bequeathed, shall be paid to the respective legatees in full, and free of the legacy-duty."

Mrs. Young died in her father's lifetime; and, after her death, he made the following codicil: "Having, since the date of my said will, lost my daughter Mary Young by death, I do, instead of the legacies bequeathed to her by my said will, which are now lapsed, give and bequeath unto her husband, Robert Young, the sum of 20,000*l.*"

Mr. Young claimed to be entitled to the legacy of 20,000*l.*, given him by the codicil, free of legacy-duty.

By the decree of the VICE-CHANCELLOR, dated the 18th of March, 1821, it was declared, that he was not entitled to have that legacy paid to him free of legacy-duty.

CHATTERIS  
v.  
YOUNG.  
[ 184 ]

*Mr. Young* appealed from so much of the decree as contained that declaration.

*Mr. Horne* and *Mr. Knight*, for the appeal :

\* \* Here the bequest of *Mr. Young* in the codicil is clearly by way of substitution for the legacy which the will had given to *Mrs. Young*. \* \* \*

*Mr. Hart*, *Mr. Agar*, and *Mr. Roupell*, *contra* :

[ 185 ]

The legacy to *Mr. Young* is a new and original legacy, given to him by the codicil only, and without reference to the will. The testator has not said that he bequeathed to him the legacy, or a part of the legacy, which the will gave to *Mrs. Young*. He merely bequeaths to him a certain sum ; assigning as a reason for doing so, that the legacy intended for *Mrs. Young* had lapsed by her death. \* \* \*

The LORD CHANCELLOR was of opinion that the legacy given to *Mr. Young* by the codicil could not be considered as given by way of substitution for the legacy which the will had destined for his wife, but was an independent, distinct, substantive bequest. He therefore confirmed the judgment of the VICE-CHANCELLOR, and

*Dismissed the appeal.*

## COWELL v. SIKES.

(2 Russ. 191—196.)

1825.

*July—Aug.**Rolls Court.*Lord  
GIFFORD,  
M.R.

On Appeal.

1826.

*Dec.*

1827.

*Jan.—April.*Lord  
ELDON, L.C.

[ 191 ]

In a creditor's suit for administering the assets of B., a joint creditor of A. and B. was permitted to prove,—A. having become bankrupt, and it appearing that there were no joint assets of A. and B.

THE bill was filed by two creditors of Richard Bayzand, on behalf of themselves and all his other creditors, against his executor Sikes, for the administration of Bayzand's estate. The usual decree had been made in the suit, and the Master had not yet made his report.

A petition, presented by Thomas Hunt and the assignees of Robert Hobbes, stated, that, from the month of December, 1808, to the month of May, 1816, Hunt and Hobbes, who were in partnership as solicitors, transacted professional business, and expended various sums of money, for Richard Bayzand and John Price, in the purchase of an estate, and in conducting a Chancery suit, in the whole of which transactions, as Hunt and Hobbes understood and insisted, Richard Bayzand and John Price were jointly interested, and became jointly liable to them, though they were instructed chiefly by Richard Bayzand; that Bayzand and Price were never connected together in any business, trade, or occupation, nor ever had any joint transactions together, except in that purchase, which was not completed, and that they never possessed any joint estates or effects; that there was due to Hunt and Hobbes, in respect of the demand on Bayzand and Price, the sum of 707*l.* 8*s.* 4*d.*; that, in July, 1816, Hobbes was declared a bankrupt; that in Trinity term, 1821, Hunt, in the joint names of himself and the assignees of Hobbes, commenced an action against Bayzand and Price for the amount of the debt, to which Bayzand pleaded a former judgment recovered for the same demand, and Price pleaded the general issue; that, in Michaelmas, 1821, an interlocutory judgment was obtained against Bayzand, for not verifying his plea, but \*before any further proceedings were had, he died, and Price soon afterwards was declared a bankrupt; that the petitioner, Hunt (in whom, by an arrangement with the assignees of Hobbes, the beneficial interest in the debt had become vested), had not thought it

[ \*192 ]

expedient to prove against the estate of Price, because he apprehended that such a proceeding would not have produced any benefit adequate to the trouble and expence which it would occasion; but that the petitioners were willing, on being indemnified, to give to Bayzand's assets the benefit of any proof to be made in their name against Price's estate; that Hunt attended before the Master, and offered to prove the debt of 707*l.* 8*s.* 4*d.* against Bayzand's estate; and that the Master declined receiving such proof, on the ground that the debt, being originally a joint debt of Bayzand and Price, did not fall within the scope of the decree.

COWELL  
v.  
SIKES.

The prayer was, that Hunt might be admitted to prove the debt under the decree, and that, if necessary, all proper directions might be given for taxing the bill. The allegations of the petition were supported by affidavit.

*Mr. Tinney*, for the petition [cited *Gray v. Chiswell* †]:

That is a direct authority for permitting the proof to be made; and the circumstance, which caused the joint creditors to be postponed to the separate creditors in that case, does not arise here; for it is distinctly sworn, that there are not and never were any joint effects. In *Ex parte Kendall*,‡ and *Devaynes v. Noble*,§ the principles are confirmed on which the decision in *Gray v. Chiswell* proceeded.

[ 193 ]

*Mr. Heald* and *Mr. Wilbraham*, *contra*. \* \* \*

*Mr. Tinney*, in reply. \* \* \*

[ 194 ]

THE MASTER OF THE ROLLS: ||

\* \* If the petitioners have the equity which they assert they have, it is an equity which cannot be attained to through the medium of this suit, but must be enforced by bill.

[ 195 ]

The petition must be dismissed; and, as Bayzand's estate ought to be indemnified against the expense of resisting it, it must be

*Dismissed with costs.*

† 7 R. R. 151 (9 Ves. 118).

§ 15 R. R. 151 (1 Mer. 529).

‡ 11 R. R. 122 (17 Ves. 514).

|| Lord Gifford.



COWELL  
v.  
SIKES.

Hunt presented a new petition to the Lord Chancellor, raising the same question.†

[\*196]

After the appeal was presented, and had come on before the Lord Chancellor, Hunt filed an affidavit, in which he stated that he had been informed, and verily \*believed, that there would be very little, if any, surplus of the assets of the testator, Bayzand, after paying Bayzand's separate debts; that he had inquired into the probability of there being any dividend likely to be made from the estate of Price; that no dividend had hitherto been made from it; and that he had been informed, and believed, that it would not produce any thing to satisfy any debts that were, or might be, proved under the commission, for that the money produced under the commission had not been sufficient to pay the commissioners' fees.

The petition was spoken to several times.

The Lord CHANCELLOR stated, that, with reference both to the principles of the Court and to decided cases, the question was one of considerable doubt and nicety.

Judgment not having been pronounced when Lord ELDON resigned the Great Seal, the parties agreed to accept his Lordship's decision, though given when he was not in office.

His Lordship's final judgment was in the following words:

"In the circumstances of this case, the proceedings at law, and the state of the funds, I think Hunt may prove against the separate estate."

† The petition, though it stated Lord GIFFORD's order, did not purport to be a petition of appeal, and was not signed by counsel as a

petition of appeal. This circumstance was mentioned expressly to his Lordship by *Mr. Tinney*.

## MARTINEZ v. COOPER.†

(2 Russ. 198—218.)

1826.  
*June* 22, 24,  
 30.  
*July* 1.  
 Lord  
 ELDON, L.C.  
 [ 198 ]

A mortgagee of a leasehold house gave up the indenture of lease to his mortgagor, in order that it might be shewn to an intending purchaser, who wished to see what the covenants in it were: the mortgagor concealed from the purchaser the fact of the existence of an incumbrance on the property, and produced the lease to him, and left it in his possession: within a week afterwards, the purchaser accepted a conveyance, paid his purchase money, and took possession of the house without any notice of the existence of the mortgage; but the solicitor of the mortgagee deposed, that, in an interview which he had had before the completion of the purchase with the solicitor of the purchaser, he had informed the latter that a client of his was to receive a considerable sum out of the purchase money, and had requested to have notice of the time when the money was to be paid; and, though the solicitor of the purchaser denied that any such interview had taken place, before the completion of the purchase, a jury gave a verdict in favour of the statement made on that point by the solicitor of the mortgagee: Held, that the mortgagee was not to be postponed to the purchaser.

*Quære.* Whether, where a bill, filed by plaintiffs, of whom some are infants, seeks to set aside a mortgage as fraudulent and void, and the Court is of opinion that the mortgage is valid, a decree can properly be made in such a suit for the redemption of the mortgage by the plaintiffs?

ACCORDING to the statement in the bill, George Payne, by virtue of a lease dated the 8th of February, 1816, was possessed of, or entitled to, a messuage, No. 17, Mornington Place, for the residue of a term of 94 years, wanting 21 days, and contracted on the 19th of August, 1816, to sell it, free from incumbrances, to Mr. Martinez for 600*l.* On the 21st of the same month of August, Payne delivered an abstract of his title to Messrs. Desse, Dendy, and Morphett, the solicitors of Mr. Martinez, to whom he represented that he had not in any manner incumbered the premises; and, on the 22nd of August, he produced and left with them the lease under which he was entitled to the term. Messrs. Desse, Dendy, and Morphett never afterwards parted with that lease; and, proceeding to investigate the title, they, between the 21st and 29th of August, caused searches to be made in the books kept at the register office for the county of Middlesex, to ascertain whether the property was subject to encumbrance;

† *Northern Counties Fire Ins. Co. v. Whipp* (1864) 26 Ch. Div. 482, 53 L. J. Ch. 629; *Brocklesby v. Temper-*  
*ance Building Society* ('95) A. C. 173, 64 L. J. Ch. 433, 11 R. 169.

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COOPER.  
[ \*199 ]

but no memorandum or entry of any encumbrance was found. On the 29th of August, the title being perfected, Mr. Martinez paid 600*l.*, as the purchase money, to Payne, who, on the same day, duly assigned the premises, free from \*incumbrances, to Blake and Smith, as trustees for Mr. Martinez and his wife and infant children. On the 6th of September, 1816, the assignment was duly registered. Some time afterwards it was discovered, that Payne, by an indenture dated the 18th of July, 1816, which was registered on the 4th of the following September, had assigned the premises to Cooper, by way of mortgage, for securing 500*l.* and interest; and Payne, having become insolvent, and quitted the country, Cooper, relying on the priority of his conveyance and of his registration, proceeded, by ejectment, to enforce his legal right.

Under these circumstances Mr. Martinez with his wife and two infant children, and their trustee, Blake, filed a bill against Cooper, praying that his mortgage might be declared fraudulent and void as against them; that he might be decreed to convey to Blake the legal estate in the premises for the residue of the term: and that he might be restrained from prosecuting his action of ejectment. The bill charged that the plaintiffs had no knowledge or notice of Cooper's mortgage, when the purchase from Payne was completed; that Cooper, before the completion of the purchase, had notice that Mr. Martinez had contracted to purchase the premises free from incumbrances; and that it was in consequence of a contrivance between Payne and Cooper that the mortgage-deed of the 18th of July, 1816, was not registered at the time when it was executed, and was concealed from Mr. Martinez till after he had paid his purchase money. Payne, it was alleged, having signed the contract with Mr. Martinez, and being required to produce his lease, which was, in fact, at that time in the possession of Mr. Hodson, Cooper's solicitor, went to Mr. Hodson, and, informing him that he was in treaty for the sale of the house, requested that the lease might be delivered to him. Mr. Hodson refused; Payne then applied to Cooper to have the \*lease delivered up to him, in order that he might show it to the person who was in treaty for the purchase of the lease; Cooper gave him a written order for the delivery of it; and, in pursuance of that

[ \*200 ]

order, Mr. Hodson gave him the lease. Mr. Hodson, it was added, called, on the 31st of August, at the office of Messrs. Desse, Dendy, and Morphett, and inquired whether Mr. Martinez had completed his purchase, and paid the purchase money. Upon receiving an answer in the affirmative, he expressed his regret, and added that a client of his (without, however, disclosing the name of the client or making any mention of a mortgage) was to have received a considerable sum out of the purchase money. Such was the outline of the case stated by the plaintiffs.

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r.  
COOPER.

To meet this case, the answer alleged, that Payne was the owner of several houses in Mornington Place, and that when the mortgage to Cooper was executed, it was his intention to dispose of some of them, and to pay off the mortgage debt out of the first monies which he should so raise. For that reason the memorial was not registered immediately; as it was deemed unnecessary to incur the expense of registration, when the mortgage debt was likely to be discharged within a few weeks. About the latter end of August, Payne requested Cooper to lend him the lease for the purpose of showing it to a gentleman then in treaty for the purchase of the house, who was desirous of ascertaining what the covenants were by which the lessee was bound: and Cooper, not suspecting that any trick or fraud was meant to be practised, did, in the presence of Mr. Hodson, deliver it to Payne, in the confidence that it would be returned in a day or two. A few days afterwards, Mr. Hodson, having heard accidentally, that Payne was in treaty for the sale of one of his houses, and that Messrs. Desse, Dendy, and Morphett were the \*solicitors for the purchaser, went to Mr. Morphett and informed him, that a client of his was to receive a considerable sum out of the purchase money, and requested that he, Mr. Hodson, might have notice of the time when the purchase was to be completed, in order that he might attend and receive the sum which was then to be paid to the party for whom he acted. Mr. Morphett promised to give the desired notice, but omitted to do so. On the 3rd of September Payne absconded without having returned the lease: in consequence of which Mr. Hodson, on the morning of the 4th of September, called at the office of Messrs. Desse, Dendy, and Morphett and was there informed that the purchase had been

[ \*201 ]

**MARTINEZ** completed, and the purchase money paid. He proceeded instantly  
**v.** to cause the memorial of Cooper's mortgage to be registered.  
**COOPER.**

The answer denied all fraud and all contrivance between Payne and Cooper; and insisted, that Cooper was not under any obligation to give Martinez notice of his security, and that, even if any such obligation had existed, the communication which had taken place between Mr. Hodson and Mr. Morphett, previously to the completion of the purchase, was sufficient notice, and ought to have put Martinez on his guard.

The evidence was contradictory.

\* \* \* \* \*

[ 202 ] Mr. Desse, Mr. Dendy, and Mr. Morphett deposed, that, previously to the 7th of February, 1817, none of them had, nor had any of the plaintiffs, any knowledge, notice, or suspicion of the existence of any mortgage or other incumbrance affecting the premises.

\* \* \* \* \*

[ 204 ] Mr. Hodson was examined on behalf of the defendant. The material parts of his evidence were the following:

[ \*205 ] "That he was present at an interview between the defendant Cooper, and Payne, about the latter end of \*August, 1816, when Payne requested to have the indenture of lease of the 8th of February, 1816, lent to him, for the purpose of showing the same, with other leases of houses which had been built by him, Payne, in Mornington Place, to a person likely to become a purchaser of one of these houses; that the deponent refused to let him have the lease, without the authority of the defendant, Cooper; that Cooper soon after called at the deponent's chambers, accompanied by Payne, and the deponent then delivered the lease to Cooper, who afterwards delivered it to Payne; that Payne then repeated the aforesaid purpose, for which he wanted the lease, and the deponent understood, that Payne was to return it to the defendant, or to the deponent as his solicitor, as soon as such purpose was effected; that the deponent always understood and believed that Payne had other houses in Mornington Place besides the house No. 17; that, after the lease had been delivered to Payne, he, the deponent, heard that Payne was in treaty to sell one of his houses in Mornington Place; that, after he had so

heard, he called at the office of Messrs. Desse, Dendy, and Morphett, and saw Mr. Morphett; that he so called, in consequence of his having been informed by Payne or by the defendant, that Messrs. Desse, Dendy, and Morphett were concerned as the solicitors for a person who was about to become a purchaser of one of Payne's houses in Mornington Place, and of its having been arranged, at the time of the execution of the mortgage, that the defendant was to be repaid the money thereby secured, out of the first money received by the sale of either of Payne's houses; that he then inquired of Mr. Morphett, whether a client of his and his partners were in treaty for the purchase of a house in Mornington Place, belonging to a Mr. Payne, when Mr. Morphett replied that there was; that the deponent then informed Mr. Morphett, that a client of him, the deponent, had to receive a \*considerable sum of money when such purchase was completed, and he then requested of Mr. Morphett to give him, the deponent, notice when the purchase money was to be paid; that Mr. Morphett then said, that deponent should have previous notice of the time of payment of such purchase money; that Mr. Morphett did not keep or perform the said promise or engagement; that the deponent did, on or about the 3rd of September, 1816, at the instance of the defendant, call at the office of Messrs. Desse, Dendy, and Morphett to inquire, and did then inquire of Mr. Morphett, whether the aforesaid purchase had been completed, and what house in particular it was which was to be sold, when Mr. Morphett told the deponent, that the house was No. 17, Mornington Place, that the purchase had been completed, and the purchase money paid, a week or ten days before; that the deponent then informed Mr. Morphett, that Cooper had a mortgage of 500*l.* on the house, and that the deponent expected that he, Mr. Morphett, would have given him previous notice of the payment of the purchase money, as he had promised to do; that the deponent immediately went to, and searched at, the office for the registry of deeds in the county of Middlesex, and, not finding that any memorial of the purchase deed had been registered, although, according to Mr. Morphett's statement, the purchase had been completed a week or ten days, he, the deponent, immediately caused the mortgage deed to be registered.

MARTINEZ  
C.  
COOPER.

[ \*206 ]

MARTINEZ  
\*  
COOPER.

[ \*207 ]

At the hearing of the cause, the VICE-CHANCELLOR directed the following issue:—"Whether Mr. John Hodson saw Mr. Nathaniel Morphett upon the subject of the matters in the pleadings mentioned, at the office of Messrs. Desse, Dendy, and Morphett, previous to the completion of the purchase therein mentioned." The parties, upon the trial of the issue, were to admit that the purchase was completed on the 29th day of August, \*1816; and the defendant in the suit was to be the plaintiff at law.

On the trial of the issue, the jury gave a verdict for the plaintiff at law; thereby finding, that Mr. Hodson did see Mr. Morphett upon the subject of the matters in the pleadings mentioned, at the office of Messrs. Desse, Dendy, and Morphett, previous to the completion of Mr. Martinez's purchase.

On the 15th of March, 1821, the cause was heard on further directions. The decree pronounced by the VICE-CHANCELLOR was, that it should be referred to the Master to take an account of what was due to the defendant, Cooper, for principal and interest on his mortgage, and to tax him his costs of the suit and at law, and also the costs of the issue; and, upon the plaintiffs, or any or either of them, paying unto him what should be reported due for principal, interest, and costs, as aforesaid, within six months after the Master should have made his report, it was ordered, that the defendant should assign the mortgage premises, free and clear of and from all incumbrances done by him, or any persons claiming by, from, or under him, to the plaintiff, Blake, upon the trusts in the pleadings mentioned; but, in default of the plaintiffs, or any or either of them, paying unto the defendant what should be so reported due to him for principal, interest, and costs, the bill was thenceforth to stand dismissed with costs.

[ \*208 ]

From this decree the plaintiffs appealed. By their petition of appeal they insisted, that an issue ought not to have been directed, inasmuch as it appeared from the depositions, and from the answer of the defendant, that he did not give the plaintiffs or their solicitors notice of \*his holding a mortgage, or having a lien on the premises, until after the purchase was completed; that the issue, which had been directed, did not, in any manner, decide upon, or materially affect, the case in equity on which the

plaintiffs relied; that the issue, if it were proper to direct any issue, should have been, to ascertain, whether Mr. Hodson gave Mr. Morphett notice of the defendant's mortgage, before the purchase money was paid, and the purchase completed. They, therefore, prayed, that the decree of the 15th of March, 1821, might be reversed, and that it might be declared that Martinez was a purchaser of the house, for a valuable consideration, without notice of Cooper's mortgage, and that they were entitled to hold and enjoy the house free of and discharged from that incumbrance.

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*Mr. Hart, Mr. Shadwell, Mr. Treslove, and Mr. Romilly, for the plaintiffs :*

The purchaser has in this case used every precaution which could be reasonably required or expected; he searched the register up to the very day before he paid his money, and found no trace of any incumbrance affecting this property; he had the original lease produced and examined; it was delivered to his solicitors, before he paid his money, and in their possession it has remained ever since. Could he suppose that there existed any mortgagee, who had never taken the trouble to register his mortgage, nor had the common prudence to retain possession of the lease which constituted the title to the house? \* \* \*

In the case of the *Thatched House Tavern*,† the mortgagor obtained the possession of the title-deeds from the first mortgagee by a false representation of the purpose for which he wanted them; and, if they had been employed only for that purpose, the possession of them could not have been rendered instrumental in fraud. In like manner, in *Evans v. Bicknell*,‡ it was by false representations, that the trustee, according to his own statement, (and the judgment of the Court seems to have proceeded mainly on the ground that it could not disbelieve his statement, when contradicted by the oath of only a single witness, and that, too, but partially and feebly,) was induced to part with the title-deeds. But Payne disclosed the purpose for which he wished Cooper to give up the lease to him; it was in order that he

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† *Peter v. Russell*, 1 Eq. Cas. Ab.      ‡ 5 R. R. 245 (6 Ves. 174).  
321; 2 Vern. 726.



MARTINEZ v. COOPER. might show it to a person who was in treaty for the purchase of the house. \* \*

[ \*211 ] Cooper was a party to the fraudulent concealment \*of the mortgage; first, by enabling Payne to suppress it; and, secondly, by the total silence of his agent on the subject, at the interview alleged to have taken place between that agent and Mr. Morphett before the 29th of August.

The decree, in point of form, cannot be sustained. The plaintiffs seek to have a mortgage declared void; the decree directs them to redeem.

*Mr. Horne, Mr. Heald, and Mr. Wakefield, contrà :*

\* \* It is a novelty to say, that, because a plaintiff is a purchaser for valuable consideration without notice, a court of equity is to transfer to him a legal estate which he has not, at the expense of another person, also a purchaser for valuable consideration, by a deed prior to his, and in whom that legal estate is vested.

[ 212 ] Cooper does not seek the assistance of a court of equity; he relies upon the legal estate which is vested in him; and it is for the plaintiffs to make out a case which shall justify the Court in depriving him of his legal rights. If he did not register his incumbrance at the earliest possible moment, he has assigned a good reason for the little delay which occurred; and he has, even in that respect, priority over the plaintiffs. On what ground, then, is he to be postponed? No reason is assigned, except that he delivered his lease to his mortgagee. \* \* There was no negligence, at least there was not gross negligence, in this act; still less was there any thing which can be characterized as concurrence in fraud. He parted with the lease for a probable and proper purpose; he had no reason to presume that Payne intended to commit a fraud; and it had scarcely been a week out of his possession, when the mischief was done. Upon the general principle of the Court, as recognized in *Evans v. Bicknell*, *Barnett v. Weston*,† and other cases of that class, these plaintiffs must fail.

But if there were any doubt on the general question, the

† 8 R. R. 319 (12 Ves. 130).

evidence of Mr. Hodson and the result of the issue are decisive in favour of the defendant. The issue must be regarded as having been properly directed, and the verdict as properly found; for there is no appeal from the order directing the issue, nor any application for a new trial. The result of the trial, therefore, has established the facts—that, before Martinez paid his purchase money, his solicitor was informed that Mr. Hodson's client was to receive a considerable part of it, and had promised that the money should not be paid without notice to him. Without regard to the intimation thus given of the existence of a claim on the price for which the property was to be sold, and in breach of the promise not to part with the money without giving the person having that claim an opportunity of protecting his own interest, the purchaser proceeds to complete his \*contract. If there is negligence any where, the blame must lie with Martinez and his agents, not with Cooper. \* \* \*

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v.  
COOPER.

[ \*213 ]

*Mr. Treslove*, in reply :

The issue and the verdict are altogether immaterial. In directing the issue the VICE-CHANCELLOR seems to have admitted, that the plaintiffs would be entitled to relief, unless it were proved, that they, or their agent, had notice of Cooper's mortgage before the purchase money was paid. But the fact found by the jury amounts to nothing. What matters it that Mr. Hodson saw Mr. Morphett before the 29th of August, on the matters in the pleadings mentioned, when it is admitted on all hands, that Mr. Hodson never uttered a syllable as to the existence of this mortgage. The decree proceeds on the assumption, that any communication between Mr. Hodson and Mr. Morphett would constitute notice to the latter of Cooper's incumbrance.

THE LORD CHANCELLOR :

The issue having found that Mr. Hodson saw Mr. Morphett on the matters in question, before the completion \*of Martinez's purchase, the VICE-CHANCELLOR, I take it, has assumed, that all the circumstances to which Mr. Hodson deposed, were true; and, taking his deposition to be true, he has decided that the mortgage is good as against the plaintiffs.

[ \*214 ]

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v.  
COOPER.

I am of opinion, that the party, in whose favour the issue has been found, is entitled to the whole benefit of the finding; but the effect of that finding cannot be carried higher than this—that, because the meeting, which Mr. Hodson mentions, took place before the completion of the purchase, and because Mr. Hodson and Mr. Morphett were present at that meeting, those things passed which, Mr. Hodson says, did then pass. The consequence will be, that all that is open to me on the appeal is, whether—regard being had to the fact, that the circumstances mentioned in Mr. Hodson's deposition have been established by a verdict,—the mortgage is to be preferred in equity to the purchase?

One of the first occasions, on which I had to consider this head of doctrine, was in a suit in which I was counsel with Mr. Ambler.† A gentleman, whose brother and sister had portions charged on his estate, was desirous of raising money by mortgage; and, to enable him to accomplish that purpose, they, by the mortgage-deed, and by indorsement on it, released their portions; but at the same time they took an agreement from their brother, which, as between him and them, kept the portions existing charges upon the estate, though without prejudice to the mortgage. Afterwards, the owner of the estate, wishing to raise more money by mortgage, got possession of the first mortgage deed, by which it appeared that the portions were released, and, showing it to another \*person, from whom he was negotiating a loan, succeeded in making a second mortgage. Lord THURLOW was of opinion, that the brothers and sisters had a better equity than the second mortgagee.

[ \*215 ]

June 30.  
—

This was a bill filed by plaintiffs, of whom some are infants, for the purpose of destroying a mortgage. The decree is converted into a bill for the redemption of that mortgage; and I apprehend, that, according to the course of the Court, that ought not to be done. Suppose that there had been no plaintiff but the infants, who come here praying that the mortgage may be declared void, and that the Court were of opinion that the mortgage was valid, if to a declaration to that effect there

† *Beckett v. Cordley*, 1 Br. C. C. 353.

were added a direction, that the infants should redeem or be foreclosed, the time of foreclosing the infants would thereby be shortened.†

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I have no doubt it was a beneficial thing for the infants to have the mortgage (supposing it to be a good security) redeemed in this suit. But if an infant files a bill for one purpose, can that bill be turned by the Court into a bill for a purpose totally different?

The question is, whether, according to the principles of a court of equity, the circumstances of this case afford a ground for postponing the mortgage to the purchase \*made by Martinez, for the benefit of himself and his family.

July 1.

[ \*216 ]

The authority, which has been principally referred to, is *Evans v. Bicknell*.‡ That was an important case, because it tended to lay down a rule among the fluctuating decisions that had been made before that time; and I there took great pains to settle the principle on which this Court ought to proceed in such questions. Between that time and this, the attention of the Court has been repeatedly called to the doctrine; and I do not find, that any of the cases, which have occurred since, have furnished any sufficient ground for disputing the law as laid down there.

The circumstances of the present case appear in the different depositions. Payne, being the owner of the house in question, and also, it seems, of other adjoining houses, and being in treaty with Mr. Martinez, requested Mr. Hodson, in whose possession, as solicitor of the mortgagee, the lease was, to deliver it to him. Hodson, with a very proper degree of caution, answered, that he could not, without Cooper's authority, part with the lease. Accordingly application was made to Cooper; and, on that application, the representation made by Payne was, that a gentleman, who was in treaty for the purchase of the house, wished to see

† The decree of the VICE-CHANCELLOR, as stated in the petition of appeal, was not open to this objection: for, though it gave the plaintiffs the power to redeem, it did not give the mortgagee the power to

foreclose. The only direction, in default of payment of principal, interest, and costs, was, that the bill should stand dismissed with costs.

‡ 5 R. R. 245 (6 Ves. 174).

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COOPER.

the lease, in order to ascertain its contents, and more especially the particulars of the covenants contained in it, and that the lease would be returned, after that purpose had been served. The lease was then delivered by Cooper to Payne.

[ \*217 ] The VICE-CHANCELLOR has directed an issue, whether Mr. Hodson saw Mr. Morphett at the office of the \*latter, on the subject of the transaction in question previous to the completion of the purchase; and the jury have, by their verdict, found in the affirmative. Though that issue does not seem to have been expressed in terms which would necessarily lead to a full investigation of all the particulars which passed at the meeting referred to,—yet I am bound, looking at the evidence and the result of the trial, to say, that, at that meeting, Mr. Morphett was informed by Mr. Hodson, that, out of the money arising from the sale of the premises for which Martinez was in treaty, a sum due to the client of him, Hodson, was to be paid. After what has passed in this cause, I am bound to consider that as the fact, whether it be really the fact or not.

Then the result of the transaction is this, that, on the one hand, Hodson is acting as the agent of Cooper, and, on the other, Morphett is acting as the agent of Martinez; and it is distinctly stated by Hodson to Morphett, that, whenever the purchase was carried into effect, Cooper was to be paid out of the purchase money.

Under these circumstances, is there fraud on the part of Cooper or his agents? Or is there that sort of negligence, or that concurrence in the acts of Payne, which, in this Court, amounts to evidence of fraud? For, if the cases, to which I have alluded, have been rightly decided, there must be either direct fraud, or negligence amounting to evidence of fraud, to induce this Court to interfere for the purpose of postponing a party who insists on the legal benefit of his deed.

After much consideration, my opinion is, that, on the principle of the authorities to which I have alluded, there is not a case sufficient to affect the mortgagee; and that, in substance, this decree must be sustained.

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I cannot help thinking, however, that a decree of this kind, made on such a bill, is wholly wrong, even though made with

the consent of all parties. Has the defendant a right to any more costs than such as would have been due to him, if this had been originally a bill for redemption ?

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\* \* \* \* \*

### COLEGRAVE v. MANBY.

(2 Russ. 238—253.)

[See 22 R. R. 245.]

1826,  
June 25, 27.

### WRAY v. FIELD.

(2 Russ. 257—262).

1826.  
Lord  
ELDON, L.C.  
[ 257 ]

A testator by his will bequeathed 4,000*l.* in trust after the death of his daughter Caroline, who was then unmarried, for her children, to be paid, if the children were under 21 and unmarried at her death, to such of them as were sons, at their ages of 21, or sooner, if the trustees should think fit; and to such of them as were daughters, at their ages of 21 years or days of marriage; but, if after Caroline's decease, the children should all die under 21, and unmarried, then in trust for Caroline's next of kin in consanguinity. Caroline married and died, leaving R. her only son, an infant. After her death, the testator by a codicil bequeathed to his grandson R. 6,000*l.* payable when he should attain the age of 21 years, and directed his executor to expend any sum not exceeding 250*l.* a year in the maintenance and education of R.: Held, that the legacy of 6,000*l.* was not a substitution for the legacy of 4,000*l.*, and that R. was entitled to both legacies.

WILLIAM WAINMAN, by his will, dated in March, 1814, after making a provision for his wife, bequeathed to his daughter, Caroline, the sum of 5,000*l.*, which he charged upon his real estates, as a portion, or fortune; and he directed, as to 4,000*l.*, part of the 5,000*l.*, that his trustees should lay it out on securities, and pay the interest to her during her life, to her separate use; and from and immediately after her decease, upon further trust, "that they, the trustees, should assign and pay all such sums of money as should be vested in them, by virtue thereof, and the interest and proceeds of the securities for the same, to any one child, or any of the children of the said Caroline Wainman, or wholly to any issue of such child, or children, or both, in such parts, shares, and proportions, at such age or ages, time or times, on such contingencies, &c. as she,

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v.  
FIELD.

[ \*258 ]

Caroline Wainman should, by any deed, or by her will, &c. appoint or bequeath the same, or any part thereof; and, in default of any such bequest or appointment, in trust for, and to be paid, transferred, and applied to and among all and every the child and children of Caroline Wainman, lawfully begotten, or to be begotten, in equal shares, and, if but one, then to such one child, at such times, and in such manner, after the decease of Caroline Wainman, as thereafter expressed; (that is to say,) to such of them as should have attained the age of twenty-one years, or have been married in the lifetime of Caroline Wainman, as soon as conveniently might be after her decease; and, if under that age and unmarried at her death, then to sons at \*their respective ages of twenty-one years, or sooner, for his or their benefit, preferment, or advancement in the world respectively, as the trustees should think proper; and to daughters at their respective ages of twenty-one years, or marriages, with legal and proper consent, which should first happen." The event of the death of one or more of the children in Caroline's lifetime was next provided for; and then the testator added, that, in case his daughter, Caroline Wainman, should have no child or children of her body, or if there should be any such, and they should all die without issue in her lifetime, or, under the age of twenty-one years and without having been married, after her decease, or if there should be any such issue, and they should all die in the lifetime of his daughter, Caroline Wainman, or, after her decease, under the age of twenty-one years and unmarried, the trustees were to transfer and pay all the trust monies unto certain relations, in such shares and manner as Caroline should appoint; and, in default of such appointment, the trust was declared to be for the sole use and benefit of the next of kin in consanguinity of Caroline Wainman, according to the statute of distributions, at the time of her death.

In September, 1816, Caroline Wainman intermarried with Mr. Wray, and died in October, 1817, leaving the plaintiff, William Henry Wray, the only issue of the marriage.

On the 3rd of April, 1818, William Wainman made a codicil to his will, which contained the following passage:—"I, William Wainman, do make this further codicil to my last will and testa-

ment, and desire that the same may be taken and considered as part thereof. I give, devise, and bequeath to my grandson, William Henry Wray, the sum of 6,000*l.* when he shall attain the age of twenty-one years, but not sooner, and do charge \*the same on my lands, tenements, and hereditaments, in the same manner as the several legacies, given, devised, and bequeathed in and by my last will and testament, are charged and made payable; and do desire that my executors, or the survivor of them, or the executors of such survivor, will then pay the same to the said William Henry Wray: and I do further direct and desire my said executors to expend and pay annually such sum as they, or the survivor of them, shall judge fit and proper, during the minority of my said grandson, for and on account of his maintenance, education, and advancement in the world, not exceeding, in any one year, the sum of 250*l.*: and I do also hereby give, devise, and bequeath to my wife, Elizabeth Wainman, 500*l.* over and besides what I have given and devised to her by my said will and testament, charged and chargeable in the same manner as therein mentioned."

WRAY  
v.  
FIELD.

[ \*259 ]

The VICE-CHANCELLOR declared by his decree, that the plaintiff, William Henry Wray, the infant, was entitled to the two legacies or sums, of 4,000*l.* and 6,000*l.*, given by the will and codicil of the testator, subject to such contingencies, if any, as they might be subject unto.

Against that part of the decree the principal defendant appealed.

*Mr. Shadwell* and *Mr. Bickersteth*, for the appellant :

\* \* Where this testator intended that a legatee under the codicil should take accumulatively, he has used express words for that purpose: the legacy of 500*l.* to the widow, is directed to be over and above what he had given her by his will: the presumption, therefore, upon the words of the will, as well as upon the reason of the thing, is, that the 6,000*l.* was not intended to be given to the infant in addition to the 4,000*l.*

[ 260 ]

*Mr. Horne* and *Mr. Barber*, for the infant :

The legacy given by the will, and that given by the codicil, are



WRAY not of the same amount, and are not given in the same manner.  
 v. \* \* Part of the 4,000*l.* might be applied for the maintenance  
 FIELD. and advancement of the infant before he attained twenty-one ;  
 [ \*261 ] \*the 6,000*l.* is not payable, unless he attains his full age.

\* \* \* \* \*

*Mr. Shadwell*, in reply. \* \* \*

THE LORD CHANCELLOR :

[ \*262 ] Under the last limitation expressed in the will concerning the 4,000*l.*, the infant, immediately upon the death of the testator, would have become entitled to the 4,000*l.* absolutely, as the sole next of kin in consanguinity of his deceased mother. If he had died a few months after the testator, the mother being then dead, and having made no appointment, the 4,000*l.* would, nevertheless, have been his, and would have gone to his personal \*representative. The sum bequeathed by the codicil is not payable till the legatee attains twenty-one. This legacy of 6,000*l.* cannot be taken as a satisfaction of the legacy of 4,000*l.* ; because a legacy payable to the infant plaintiff, when he attains twenty-one, cannot take away from him the right to a sum of money, which, in the events that happened, vested in him absolutely at the moment the testator died.

*Decree of the Vice-Chancellor affirmed.*†

1826.  
*July 13.*

Lord  
 ELDON, L.C.  
 [ 262 ]

MACKENZIE *v.* MACKENZIE.†

(2 Russ. 262—274).

Legacies given by a codicil, held to be additions to, and not substitutions for, legacies given by the will to the same legatees.

WILLIAM MACKENZIE, formerly of the island of St. Vincent, in the West Indies, but being then resident in England, made his will, which contained the following bequests:—"I give to Margaret Lincoln, of the island of St. Vincent's aforesaid, the sum of 1,500*l.* sterling. I give to my reputed son, Alexander Mackenzie, the sum of 5,000*l.* sterling, to be paid to him on his attaining the age of twenty-four years, but with full power for my executors, at their discretion, previously to apply all or any

† See next case. † *Wilson v. O'Leary* (1878) L. R. 7 Ch. 448; 41 L. J. Ch. 342.

part or parts of the same principal sum, or the interest thereof, in or towards his maintenance, education, or advancement in the world. To my nephews, Roderick Murchison and Kenneth Murchison, I give the sum of 2,000*l.* sterling each: to my nieces, Jannetta Murray and Barbara Murray, I give the sum of 2,000*l.* sterling each, to be paid to them respectively on their respectively attaining the age of twenty-one years: to my aunts, Mary Walcott and Mary Mackenzie, I give the sum of 400*l.* each, to be \*paid to them within twelve months from my death: and I give the sum of 1,000*l.* to Watkins Williams Massie and Robert Sutherland, upon trust, to lay out the same at interest, upon Government security, and pay the dividends thereof to my sister, Barbara Murray, wife of Colonel Robert Murray, or permit her to receive the same for her own separate use, independent of her husband, during their joint lives, and, in the event of her surviving him, to transfer and pay the said principal money or stock purchased therewith, and any interest remaining due thereon, to her my said sister absolutely; but, if my said sister shall die before her said husband, then, on her death, the said sum of 1,000*l.*, or the stock purchased therewith, and any interest due thereon, to be transferred and made over to her two daughters, Jannetta Murray and Barbara Murray, in equal shares, if both living at their mother's decease; but, if only one of them shall then be living, the whole to be transferred and made over to such one daughter. To my friends, Robert Sutherland and Thomas Paterson, I give the sum of 100 guineas each, to purchase a ring or trinket, as a token of my regard. All the rest and residue of my estate and property, both real and personal, whatsoever and wheresoever, after satisfying my debts and legacies aforesaid, and any legacy or legacies I may give by any codicil to this my will, and except as aftermentioned, I give, devise, and bequeath to my brother, Lieutenant-General Alexander Mackenzie, his heirs, executors, administrators, and assigns, should he be alive at the period of my death; but should his death precede mine, my will and desire is, that the respective legacies or principal sums before given to my reputed son, Alexander Mackenzie, and to my nieces, Jannetta and Barbara Murray, shall each be considered as doubled in amount, and twice the amount of the sums \*before

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c.  
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[ \*263 ]

[ \*264 ]

MACKENZIE given to each of them be paid accordingly ; and the whole residue  
 of my property, both real and personal, remaining after satis-  
 fication of the said legacies, with such increase as aforesaid, and  
 also after satisfying any legacy or legacies I may give by any  
 codicil or codicils to this my will, and except as hereinafter  
 mentioned, I give, devise, and bequeath to my nephews, Roderick  
 Murchison and Kenneth Murchison, their heirs, executors, admi-  
 nistrators, and assigns, share and share alike, as tenants in  
 common, if they shall be both living at the time of my decease ;  
 but in case of the death of either of them in my lifetime, then  
 I give and bequeath the whole of such residue unto the survivor  
 of them, his heirs, executors, administrators, and assigns, abso-  
 lutely, and for ever. And I do hereby declare my mind and  
 will to be, that interest at the rate of 5 per cent. per annum  
 shall be paid and payable upon the several pecuniary legacies  
 hereinbefore mentioned, from the time of my death until the  
 same shall be respectively paid and satisfied, according to the  
 directions of this my will : Provided always, and I do hereby  
 expressly declare, that nothing hereinbefore contained shall be  
 considered to extend to or be construed as operating upon any  
 landed or real family-property or estates to which I may become  
 entitled, in the event of my brother, the said Alexander  
 Mackenzie's dying in my lifetime ; but I do hereby, as far as  
 I at present or hereafter may have any power or authority so  
 to do, expressly give and devise the same family-property, and  
 every part thereof, with the appurtenances, and all my estate and  
 interest therein, of what nature, kind, or quality soever the  
 same may be, unto my aforesaid nephew, Roderick Murchison,  
 his heirs and assigns, to hold the same to my said nephew,  
 Roderick Murchison, his heirs and assigns, &c. &c. ; . . . and,  
 [ \*265 ] in case the said Roderick Murchison should happen \*to die in  
 my lifetime, then I give and devise the said landed or real family-  
 property and estates, so far as I now or hereafter may have  
 any power or authority so to do, and all my estate and interest  
 therein, of what nature, kind, or quality soever, unto my afore-  
 said nephew, Kenneth Murchison, his heirs and assigns, &c."

The testator appointed his brother, Alexander Mackenzie, and  
 his friends, Robert Sutherland and Thomas Patterson, his

executors; but, if his brother should die in his lifetime, he appointed his nephews, Roderick Murchison and Kenneth Murchison, to be executors with Robert Sutherland and Thomas Patterson. MACKENZIE  
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MACKENZIE.

Some time afterwards, the testator made the following codicil, dated the 23rd of October, 1819.

“Whereas I, William Mackenzie, at present of the city of Florence, in Italy, being desirous of making this my codicil to my last will and testament, executed by me before leaving England, but the date whereof I am not able at present precisely to ascertain; and also being desirous that this my now codicil should be taken and duly held as part and parcel of my last will and testament, I do therefore give, grant, and bequeath as follows: First, I give and bequeath to my sister, Mary Massie, and to my half brother, Hugh Scott, and to my half sister, Georgina Scott, severally and respectively, the sum of 1,000*l.* sterling money of Great Britain, each; secondly, I give and bequeath to my nephews, Roderick Murchison, and Kenneth Murchison, and to my nieces, Jannetta Murray, and Barbara Murray, severally and respectively, the sum of 2,000*l.* like sterling money, each; thirdly, I give and bequeath to my sister, Barbara Murray, wife of Colonel Robert Murray, my brother-in-law, the sum of 3,000*l.*, like sterling money; \*and to the said Colonel Robert Murray, my brother-in-law, likewise the sum of 3,000*l.* like sterling money, together with my ready money, notes, or bills, convertible into money, that may be found in my possession at the time of my death, and also my carriages and horses of any kind, and my gold watch; fourthly, I revoke the legacy bequeathed in my aforesaid last will and testament to my aunts, Mary Walcott and Mary Mackenzie, and, in lieu thereof, I give and grant and hereby bequeath to each of them respectively an annuity of 150*l.* sterling money as aforesaid, say 150*l.* sterling to each, annually for life, with the benefit to the survivor of the whole sum of 300*l.* sterling, for her life; fifthly, I give and bequeath to my reputed son, Alexander Mackenzie, by Margaret Lincoln, the sum of 5,000*l.* like sterling money, on his attaining the age of twenty-four years; sixthly, I hereby confirm an annuity to the said Margaret Lincoln, of 200*l.* of like sterling

[ \*266 ]

MACKENZIE money, executed by me on a certain deed or instrument of  
 v.  
 MACKENZIE. writing of my own drawing, and do hereby desire and will that the same be confirmed, giving and granting to her the said annual sum of 200*l.* sterling, for her life, and also the sum of 1,000*l.* like sterling money, as a legacy, to be paid after my death to her, over and above and exclusive of any former provision made by me for her in my last will and testament; and, finally, charging all my estates, real and personal, with the said several legacies and annuities, and in all other respects confirming the said last will and testament above mentioned, I do hereby will and direct that this codicil shall be taken as part thereof to all purposes, and with full effect."

[ \*267 ] A few days after the date of this codicil, the testator, William Mackenzie, died. Sir A. Mackenzie and Robert Sutherland, the two executors resident in England, proved \*the will. Doubts having arisen whether the legacies given to some of the legatees by the codicil were added to or substituted for those given by the will, a bill was filed by and on behalf of Alexander Mackenzie, Roderick Murchison, Kenneth Murchison, Barbara Murray the younger, Jannetta Sutherland formerly Jannetta Murray, and Barbara Murray the elder, who were legatees named both in the will and codicil, against Sir A. Mackenzie, as the heir at law, residuary devisee, and one of the executors of the testator, and against Robert Sutherland, the only other executor resident within the jurisdiction. \* \* The prayer was, that the whole of the legacies given by the will and codicil, and the interest due thereon, might be raised and paid out of the testator's real and personal estate. \* \* \*

[ 268 ] At the hearing of the cause, on the 11th of December, 1821, the VICE-CHANCELLOR made a decree, declaring, that the legacies given by the codicil to "Alexander Mackenzie, Roderick Murchison, and Kenneth Murchison, respectively; to Jannetta, the wife of Robert Sutherland, and Barbara Murray, the daughter, respectively; and also to Barbara Murray, the elder, wife of Robert Murray, were in addition to the legacies given to them by the will;" and, the defendants, Sir A. Mackenzie and Robert Sutherland, not admitting assets of the testator sufficient

for the payment of the whole of the testator's debts and legacies, the necessary accounts were directed. MACKENZIE  
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The defendant, Sir Alexander Mackenzie, appealed from this decree.

*Mr. Horne and Mr. Pemberton*, for Sir A. Mackenzie [cited *Hurst v. Beach*,† *Barclay v. Wainwright*,‡ *Benyon v. Benyon*,§ and other cases].

*Mr. Hart, Mr. Shadwell, and Mr. Miller*, for the plaintiffs [ 269 ]  
[cited *Hooley v. Hatton*||]:

No case is to be found, where, in the instance of a will and a single codicil only, a legacy given *simpliciter* by the codicil, of equal amount with a legacy given by the will, has been held to be substituted for it. \* \* \* [ 271 ]

*Mr. Garatt* appeared for the trustees of Jannetta Murray. [ 272 ]

#### THE LORD CHANCELLOR : ¶

With respect to two of these legatees, the legacies given to them by the will and codicil are not the same, viz. those given to Alexander Mackenzie and Barbara Murray the elder. The legacy given to A. Mackenzie by the will is, "the sum of 5,000*l*.

+ 21 B. R. 304, 307 (5 Madd. 351, Hooley.  
358).

† 9 B. R. 245 (3 Ves. 462).

§ 11 B. R. 12 (17 Ves. 34).

|| 1 Br. C. C. 389.

In this report of *Hooley v. Hatton*, the codicils of Lady Isabella Finch are not set forth in the order in which they ought to stand.

By an extract from the registry of the Prerogative Court of Canterbury, it appears, that the legacy given to her maid was in these words, "I give to my woman, Lydia Hooley, five hundred pounds, to be paid to her within three months after my decease."

The first codicil was in these words:

"October 28th, 1769.

"This codicil I add to my will: I give one thousand pounds to Lydia

"CECILIA ISABELLA FINCH."

The second codicil was as follows:  
"I, Lady Cecilia Isabella Finch, do desire this paper writing may be accepted and taken as a codicil to my will. I give to my servant, Lydia Hooley, over and besides what I have left her by my will, an annuity of 12*l*. per annum for her life, to be paid quarterly, on the usual days of payment, the first of the said payments to commence on the first of the said days which shall happen after my decease. Lady Isabella Finch further orders the sum of 60*l*. to be paid to Rebecca Hooley.

"CECILIA ISAB. FINCH."

Note by *Mr. Miller*.

¶ *Ex relatione* Mr. Miller.

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<sup>r.</sup>  
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sterling, to be paid to him on his attaining the age of twenty-four years, but with full power for my executors, at their discretion, previously to apply all or any part or parts of the same principal sum, or the interest thereof, in or towards his maintenance, education, or advancement in the world." The legacy given by the codicil is in these words: "I give and bequeath to my reputed son, Alexander Mackenzie, by Margaret Lincoln, the sum of 5,000*l.* like sterling money, on his attaining the age of twenty-four years." Now, though the testator probably thought that he was giving in the codicil a legacy of the same amount and having the same qualities as the legacy given in the will, yet, as the legacy given by the codicil does not carry interest till twelve months after the testator's death, and does not become payable till the legatee shall have attained the age of twenty-four, which he might never reach, and as no part of either the principal or interest is, in the mean time, applicable to his maintenance, education, or advancement (as the legacy given by the will was),—I am bound to hold, that the two legacies, given by the will and by the codicil, are not the same either in nature or in amount; and if so, I am not at liberty, according to the rules of this Court, to declare the one to be a substitution for the other.

[ 273 ]

The same reasoning applies still more strongly to the legacies given to Barbara Murray the elder. By the will the testator gives 1,000*l.* to trustees for her benefit, with a direction to them to pay the interest to her during her husband's life, and, in case she should survive her husband, to pay the principal and interest to her absolutely. By the codicil he gives and bequeaths to her personally the sum of 3,000*l.* The two legacies, therefore, differ materially from each other both with regard to amount and management.

Then there remain the legacies to Roderick Murchison, Kenneth Murchison, Jannetta Murray, and Barbara Murray, to each of whom 2,000*l.* is given by the will, and the same sum by the codicil. But then, I observe, that the legacies of 2,000*l.* each, given by the will, are expressly directed to bear interest from the time of the testator's death; whereas, in those given by the codicil, nothing is said about interest, and, consequently,

no interest begins to accrue till twelve months after the testator's death. Here then, there is one distinction between the two sets of legacies, which, though the testator may not have been aware of it, this Court has distinctly recognised.

It is true, on the other hand, that the testator has expressly declared that the legacy given by the codicil to Margaret Lincoln should be "exclusive of any former provision" made by him for her in his last will and testament; and, if there were no other facts connected with this will and codicil, it might be difficult to say what weight ought to be attached to the words used concerning that bequest. But there are other circumstances, which, it seems to me, lead to a contrary inference. In the first place, I observe, that by the will he bequeaths to certain persons all the rest and residue of his real and \*personal estate, after satisfying "my debts and legacies aforesaid, and any legacy or legacies I may give by any codicil to this my will." Then, in the beginning of the codicil, he expressly refers to the will itself; and, in the conclusion of it, he "in all other respects confirms the said last will and testament above mentioned." I also observe that these four legatees were peculiar objects of the testator's bounty. To one of them, Roderick Murchison, he has, as far as he could, devised his family estate, after the death of his brother, Lieutenant-General Alexander Mackenzie; and by his will he also specifically provides, that, should the death of Alexander Mackenzie precede his own, "the respective legacies, or principal sums before given to my reputed son, Alexander Mackenzie, and to my nieces Jannetta and Barbara Murray, shall each be considered as double in amount;" and, in that event, he also gives to these two other legatees, Roderick Murchison and Kenneth Murchison, the whole residue of his property, real and personal, after payment of the legacies given by his will, or which might be given by his codicil.

Taking all these circumstances into consideration, it is too much for me to say, that the legacies given by this codicil are not in addition to those given by the will. In cases of this kind, there is always a degree of doubt and difficulty, greater or less; and it depends entirely upon the judge, before whom the case comes, to say, what he conceives the intention of the testator to

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[ \*274 ]



MACKENZIE v. MACKENZIE. have been. Upon the whole, my opinion is, that, in this instance, the legacies given by the codicil must be taken to be additions to those given by the will.

*Appeal dismissed.*

1826.  
June 26, 27.  
July 1, 8, 11.

Lord  
ELDON, L.C.  
[ 275 ]

## THE MARQUIS OF BUTE v. CUNYNGHAME.†

(2 Russ. 275—302.)

The purchaser of an estate A., in order to secure the payment of the purchase money, executed a deed, by the first part of which another estate B. was mortgaged for the whole sum, and by the latter part of which, the estate A. was also mortgaged as a further and collateral security: Afterwards the two estates became the property of two different persons, who respectively derived title from the purchaser: Held, that the estate B. was the primary security, and that, as between the owners of the two properties, the estate A. was not to be resorted to for the payment of any part of the mortgage debt, till the estate B. was exhausted.

A father covenanted, upon the marriage of a younger son, to grant a perpetual annuity or rent-charge of 600*l.*, to be issuing out of an estate which consisted principally of collieries; and the deed granting the annuity was to contain a covenant that the grantor, his heirs, executors, administrators, and assigns, would make good the deficiency, if the produce of the estate should not be sufficient to answer the annual payments: by his will the grantor gave to his executors a sum of 15,000*l.*, upon trust, out of the interest thereof to make good, at the end of every year, any deficiency of the collieries to answer the annuity, and, at the end of each year, to pay the surplus of the yearly interest to certain persons therein described; the profits of the estate charged with the annuity were, in some years, not sufficient, and in others much more than sufficient, to pay the 600*l.* a year: Held, that the persons interested in the surplus of the 15,000*l.* could not claim compensation out of the surplus profits of the collieries in prosperous years, for that portion of the interest of the 15,000*l.* which had been applied in discharge of the annuity in those years when the profits of the collieries were not sufficient to satisfy the annuity completely.

[The facts and circumstances necessary to explain the first point mentioned in the above head note are sufficiently stated in the judgment, the following statement has exclusive reference to the second point in the head note.]

\* \* \* \* \*

[ 279 ] In 1778, Lord Bute, upon the marriage of Sir Charles Stuart, one of his younger sons, covenanted, by articles of agreement, dated the 18th of April, 1778, to grant, convey, and assure to

† *In re Athill* (1880) 16 Ch. Div. 211, 50 L. J. Ch. 123; *In re Dunlop* (1882) 21 Ch. Div. 583, 592.

proper trustees, upon certain trusts, for the benefit of the intended husband and wife and their children, a perpetual rent-charge of 600*l.* per annum, to be issuing out of and charged upon [certain] collieries, hereditaments, and premises in the counties of Northumberland and Durham, \* \* and it was stipulated that the deed for settling or securing the annuity should contain a \*covenant on the part of the Earl of Bute, his heirs, executors, and administrators, to make good the deficiency, if the produce of the estates, on which the annuity was charged, should not be sufficient to answer it completely.

MARQUIS OF  
BUTE  
v.  
CUNYNG-  
HAME.

[ \*280 ]

On the 11th of May, 1778, Lady Bute and her second son executed a deed of appointment, under which Lord Bute became entitled absolutely to 19,000*l.*, part of the 48,500*l.* secured by the mortgage [referred to in the head note to this case].

The Earl of Bute made his will, dated the 23rd of May, 1789, whereby (after reciting, that, by articles of agreement of the 18th of April, 1778, he had covenanted to charge the collieries, lands, and hereditaments in Northumberland and Durham with a perpetual yearly rent-charge of 600*l.*, and that, in the settlement of that annuity, a covenant should be inserted on the part of him, the Earl of Bute, his heirs, executors, and administrators, for making good any deficiency in the produce of the estates out of which the annuity was to issue) he gave and devised all his freehold and leasehold lands, collieries, and premises in the counties of Northumberland and Durham, to trustees, their heirs, executors, and administrators, upon trust, in the first place, to make and execute a proper grant of the annuity of 600*l.*, and, subject thereto, for his wife, during her life, and, after her decease, upon certain trusts for the family of his second son. Then, after reciting the deed of appointment of the 11th day of May, 1778, he gave and bequeathed that sum of 19,000*l.* “ to his executors, upon trust, to lay out and invest the sum of 15,000*l.*, part of the 19,000*l.*, upon government or real securities; and out of the interest and dividends thereof, at the end of each and every year, to make good any deficiency of his said estates in the counties of Northumberland and Durham, to answer the aforesaid clear annuity or yearly sum of 600*l.*, charged upon and payable \*out of the said estates; and upon further trust, at the end of each

[ \*281 ]

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HAME.

year, to pay the surplus of the yearly interest of the said trust funds or securities, beyond what should have been called for and exhausted in making good the deficiency of the said estates to answer the said annuity of 600*l.*," to his son, Lord Mountstuart, during his life, to be applied in such manner as he should think fit, for the benefit of his younger children for the time being: and from and after his death, the testator directed that the surplus interest or dividends of the said trust funds or securities, beyond what should from time to time be applied in making good the deficiency of his said estates to answer the annuity of 600*l.*, should be paid to or divided among all and every or any one or more of the younger children of his son, Lord Mountstuart.

Lord Bute died in March, 1792. The Hertfordshire and Bedfordshire property, known by the name of the Luton estate, went to his eldest son, Lord Mountstuart, afterwards first Marquis of Bute, as tenant for life: and, upon his death in 1814, it devolved to the present Marquis, as tenant in tail. They had kept down the whole of the interest of the mortgage debt of 48,500*l.* Lady Bute enjoyed the Durham and Northumberland property from March 1792 till her death, in 1794; when it went to the family of the Earl's second son, and, finally, became vested in Mr. Wortley.

The annuity of 600*l.*, charged on the collieries, having fallen into arrear, the widow and son of Sir Charles Stuart filed a bill in 1808, praying that an account might be taken of the rents, profits, and produce of the estates and property in the counties of Durham and Northumberland, and also of the interest of the 15,000*l.*, and that the arrears of the annuity might be satisfied, and the \*future payment of it secured. By the decree made at the hearing of that cause, on the 20th of January, 1809, certain accounts were directed to be taken: and it was ordered, that it should be referred to the Master to inquire into the amount of the saving, or surplus, from time to time, made from the income arising from the freehold and leasehold collieries and estates in the counties of Northumberland and Durham, over and above what was sufficient to pay the said annuity of 600*l.*, and the necessary expences, and to inquire also into the application of such savings, or surplus, from time to time, from the death of

[ \*282 ]

John Earl of Bute, and of the debt, if any, which had been contracted, from time to time, by Sir William Augustus Cunynghame (the trustee in whom the collieries were vested), for the purpose of renewing the leases, and otherwise relating to the collieries and estates, and whether anything, and what, remained due in respect of such debts.

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The parties interested in the annuity, thinking it more for their advantage to resort immediately to the 15,000*l.*, did not prosecute the accounts or inquiries directed by this decree, except so far as to ascertain the amount of the arrears due to them. The Master made a separate report of these arrears; and, on the 14th of April, 1813, the Court ordered the Marquis of Bute to pay two sums, one of 50*l.*, and another of 6,412*l.* 10*s.*, for arrears of the annuity down to Michaelmas, 1812; but the payment was to be without prejudice to any claim of the Marquis of Bute, or any other person or persons, in respect of the application of any part of the rents and profits of the freehold and leasehold collieries and estates of John Earl of Bute, in the counties of Northumberland and Durham, which were applicable to the payment of the annuity, and which it should thereafter be made to appear had been otherwise applied, or to any proceedings in the \*cause, which the Marquis of Bute, or any other person or persons, upon application to the Court, should be authorised to institute, in order to make good such claim, or to any other suit which he or they might be advised to institute for that purpose.

[ \*283 ]

The Marquis had, from time to time, applied the interest of the 15,000*l.* for the benefit of his younger children; and he paid these two sums out of his own estate.

The bill was filed by the present Marquis of Bute, in his own right, and as the personal representative of his father, against the parties interested either in the Northumberland and Durham property or in the 15,000*l.* The plaintiff \* \* alleged, that the profits of the estates and collieries in Northumberland and Durham had been amply sufficient both to pay a due proportion of the interest on the mortgage, and to satisfy the annuity of 600*l.* a year, but that a great part of these profits had been employed in extending and improving the collieries, and in opening and winning new mines, so as to exhaust the monies out

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[ \*284 ] of which the annuity ought to have been kept down ; that, if the clear profits of these premises had been in some years insufficient for the payment of the annuity, they had in other years exceeded the amount necessary for that purpose ; and that the surplus profits of one year ought to be applied to make good the deficiencies of \*other years. The substance of the prayer [in reference to this point] was \* \* that, if it should appear that, in any year or years since the death of John Earl of Bute, the rents and profits of the collieries, estates, and premises in Northumberland and Durham, had been insufficient for the payment of the annuity of 600*l.*, but that in other years they had been more than sufficient for that purpose, then the surplus profits of these collieries, estates, and premises in some years might be applied to make good the deficiencies of the rents and profits arising from them in other years ; and that various accounts connected with the alleged rights of the plaintiff might be taken.

\* \* \* \* \*

[ 285 ] The VICE-CHANCELLOR, by his decree made on the 12th of July, 1819, dismissed so much of the bill as sought [to have the surplus profits of the collieries in some years applied to make good the deficiencies in other years].

[ 288 ] *Mr. Horne, Mr. Sugden, Mr. Pepys, and Mr. Sidebottom, for the plaintiff [who appealed].*

[ 294 ] *Mr. Pemberton, for parties interested in the 15,000*l.**

*The Solicitor-General, Mr. Shadwell, and Mr. Bickersteth, for Mr. Wortley. \* \* \**

[ 296 ] *Mr. Tinney, for other parties in a similar interest.*

THE LORD CHANCELLOR :

The first question must be decided by the effect of the deeds ; regard being had to the contents of those deeds, and to the nature of the property which was the subject of disposition.

Mr. Wortley, the father of Lady Bute, was a partner in the coal trade with Lord Ravensworth and Mr. Bowes. In his will,

he described particularly the lands and chattels connected with or employed in this trade; and, foreseeing that it might not be a very comfortable species of property for his daughter to possess, he gave power to sell it, directing that the money to arise from the sale should be invested in securities, till it was laid out in the purchase of land. It was thought more advisable that Lord Bute should be the owner of this property, and the partner in this trade, than that it should continue to belong to Lady Bute; and, accordingly, a proposition was made, that the property should be sold in pursuance of the powers given by Mr. Wortley's will, and that Lord Bute should become the purchaser. If the directions in Mr. Wortley's will had been strictly observed, the purchase \*money would have been paid, and would then have been laid out on mortgage or government securities; but, instead of taking that course, it was thought more convenient, that Lord Bute, having agreed to be the purchaser, should come to this Court with a bill, and that the contract should be carried into execution under the sanction of the Chancellor.

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In that suit a decree was obtained; and the mode of completing the transaction adopted by the Court was, that this property should be conveyed to Lord Bute, and that he should, by mortgage, secure the purchase money. If he gave such a mortgage as the Court approved of, the transaction, passing over the actual receipt of the money, would terminate in the same result, as if the money had been first paid into Court, and then invested in a real security. In the order of reference, in the Master's report, and in the order of the Court authorising the execution of the plan which had been proposed, the transaction is represented in the same way, and is spoken of in the same language.

The Master reported that he had looked into the title to the Hertfordshire and Bedfordshire estates, of which a mortgage was proposed to be made, and that he approved of it; and that Lord Bute had farther proposed, that the premises, which he was purchasing, should likewise be subjected as a collateral security for the money which was to be charged on the Hertfordshire and Bedfordshire estates. When the proposal carried in is a proposal for a collateral security; when the proposal adopted

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is a proposal for a collateral security ; when the proposal is directed to be carried into execution by an order speaking of a collateral security ; and when the instrument, carrying it into effect, purports to be by way of collateral \*security ; can it be judicially held, that these words are to have no effect at all ?

When you consider that the property, thus made a collateral security, was held for the purpose of a trade or business, which was sometimes a gaining trade, and sometimes a losing one, it will not appear strange that a mortgagee should have said, “I have no objection to take these mines and the things connected with them as a collateral security, provided I have another primary security, which will save me the trouble of having recourse to the former.”

What would have been the course and mode of conveyance, ordinarily speaking, if this colliery property had been bought, and it had been the purpose of the parties that part of the consideration money should remain in the hands of the purchaser, on the security of the property itself ? The conveyance to the purchaser would have been so made, that the vendor would still, under that conveyance, have been in the nature of a mortgagee. That is not the course taken here. The first thing done is, to make a separate absolute conveyance of the estate of Lord But<sup>e</sup> ; having done this, a mortgage is then made of both estates in the most regular form. The Luton estate is first mortgaged ; and then the parties, in obedience, as they recite, to the decree, order, and reports, proceed to convey the Durham and Northumberland property as a collateral security. They do this by conveying, first, the freeholds ; next, the leaseholds ; and, lastly, the stock, moveable chattels, debts, &c. ; and there is no covenant in this latter part of the deed, or relating to this part of the property, except that, if the money be paid according to the proviso which is introduced in the mortgage of the Luton estate, the term shall cease and be absolutely void.

[ 299 ]

This case, therefore, differs from that of *Aldrich v. Cooper*.† There the word collateral, which we find here, did not occur. In *Aldrich v. Cooper*, all the covenants related to both estates ; the purpose was to make both the freehold and copyhold subject

† 7 R. R. 86 (8 Ves. 382).

immediately to the debt, though there were not means of making a legal conveyance of both.

If Lord Bute had wished that both estates should be equally liable, I do not mean to say that he might not have made them so liable, or that, as between him and the mortgagee, Lord Bute would not have been, as to both, in the situation of a common mortgagor. But may not a man make a mortgage of two estates in such a way, that, though the incumbrancer may go against both or either, yet, if the owner of the equity of redemption shall have created, in the mean time, two different titles to those estates, so that they shall go to different persons, the estate, which was the primary security shall remain the primary security, as between the persons claiming under that mortgage?

Afterwards Lord Bute marries; and, on that occasion, articles are executed, in which Lord Bute must be considered, in equity, as a purchaser, at a certain price, of the stipulations there made for his children and grandchildren. By these articles he settles his Scotch estates; and, for the considerations therein mentioned, he settles also the Luton estate; which Luton estate, so conveyed, is stated to be conveyed subject to a mortgage for 48,500*l*. Now, without entering into the question, whether in every case a marriage settlement, such as that is, and expressed in such language, is to amount to a contract, that a mortgage affecting several estates shall be a charge only on the settled estates, so as to free other estates from what previously was a common incumbrance; yet, taking the \*whole matter together, is not that to be considered the meaning of the transaction which took place upon Lord Mountstuart's marriage? It has been said by the counsel for Lord Bute, that all parties had notice of the indenture of the 1st June, 1764, and, therefore, that they had reason to believe that both estates were charged, and that they dealt upon that supposition. But of what did that notice inform them? Of nothing more than this—that one estate was directly pledged with all the regularities of mortgage, and that the other was indirectly pledged. Could the parties interested under the settlement of 1766 turn round upon Lord Bute, and say, “You have brought into settlement the Luton estate; you have told us, that you bring it into settlement, subject to a charge, the

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amount of which you expressly state to be 48,500*l.*; but, now that the marriage has taken place, we tell you, that there are certain collieries belonging to you, which are also answerable to the mortgagee for the payment of that sum of 48,500*l.*; and we must now have an account of the proportionate value of those collieries, in order that we may obtain, with respect to that mortgage, a relief which is not once alluded to in the articles under which we claim ? ”

Taking the whole of this transaction together, and without venturing to lay down any general principle, it is my opinion, that, in this case, there is no right to that contribution towards satisfaction of the mortgage, which is prayed by the bill.

July 1.

THE LORD CHANCELLOR :

[ \*301 ]

The second question in this suit related to the annuity of 600*l.* The VICE-CHANCELLOR has said, that, till a certain account is taken, that point does not arise; and he therefore directed a limited account. But it \*would be a great convenience to the parties to know what the law is, supposing a certain state of facts to be assumed: for if the law is as contended for on one side, the taking of the account may prove to be an useless expense. I shall endeavour, therefore, to make an end of the cause, taking the result of the account hypothetically.

It was admitted at the Bar, that, in some years the produce of the collieries had not been sufficient to answer the annuity, and that, in other years, they had been much more than sufficient for that purpose.

July 8.

THE LORD CHANCELLOR :

If I understand rightly the decree of the VICE-CHANCELLOR, he has declined to give any relief as to the demand made in respect of the annuity of 600*l.* a year, antecedent to the order of 1809; and he has gone on to direct an account of the profits of the collieries subsequent to 1809, for the purpose of determining hereafter what is to be done as between the interest of the 15,000*l.* and the produce of the collieries since that time. If the decree was meant to dismiss the bill with respect to contri-

bution between the collieries and the interest of the 15,000*l.* before 1809, the first question will be, whether that part of the claim of the plaintiffs ought to be disallowed? and the other question will be, what is to be done with respect to the relief which is sought from and after 1809?

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THE LORD CHANCELLOR :

July 11.

In the deed which is here the grant of the annuity, Lord Bute covenanted to make good the deficiency of \*the produce of the collieries to answer the annuity. That covenant would affect his general assets, and they would be answerable for the deficiency, independently of the directions in the will; so that the words of the will must be looked at, not by themselves, but in conjunction with that covenant.

[ \*302 ]

The LORD CHANCELLOR ultimately stated his opinion, that the plaintiff was not entitled to the relief which he prayed, with respect to the annuity, against the owners of the collieries.

“His Lordship doth order that the plaintiff’s bill do stand dismissed out of this Court, without costs, and that the sum of 10*l.*, deposited with the Register on setting down the appeal, be returned to the plaintiff.”—Reg. Lib. 1825, A. 2148.

## ATTORNEY-GENERAL v. MORGAN.

(2 Russ. 306—308.)

1826.  
July 11—13.

Lord  
ELDON, L.C.  
[ 306 ]

Trustees of a charity grant an improper lease of the charity lands, in which they covenant with the lessee for his actual enjoyment of the demised premises during the term: The Court in setting aside the lease, will order the indenture of demise to be cancelled *in toto*, and will not leave the personal covenants of the trustees in force for the benefit of the lessee.

In this cause the information was filed to set aside a lease for ninety-nine years, which the feoffees and trustees of a charity had granted of an orchard, part of the charity lands, at a very low annual rent. The lease contained a covenant, from the trustees and feoffees, for the lessee’s actual enjoyment of the premises during the term. When the cause came to a hearing

ATT.-GEN. before the Vice-Chancellor, the defendants made default; and  
 v. the relators took such decree as they could abide by. The  
 MORGAN. decree, thus taken, contained a direction that the lease should  
 be cancelled.

The lessee appealed.

*Mr. Agar and Mr. Wakefield*, for the appellant :

[ \*307 ] Though this lease cannot be sustained so as to entitle the  
 lessee to hold the charity lands according to the \*demise, the  
 decree goes too far in ordering it to be cancelled. The trustees  
 have entered into a covenant for actual enjoyment; and  
 the lessee has a right to make what use he can of that  
 covenant. \* \* \*

*Mr. Heald and Mr. Garratt* for the relators, the  
 respondents :

[ \*308 ] \* \* The covenant for actual enjoyment is a mere accessory  
 to the substantial part of the contract; \*and, the contract being  
 annihilated, the accessory must follow the fate of the principal.  
 A covenant to be guilty of a breach of trust, is, of all species of  
 obligation, the one which a court of equity must be the most  
 disposed to set aside.

THE LORD CHANCELLOR

Remarked, that he was not aware that the point raised in this  
 appeal had ever been decided. It was clear that the indenture  
 of lease, so far as it was a demise of charity lands, could not  
 stand: but it was a different question, whether the Court would  
 do any thing with the covenant of the trustees.

On a subsequent day, his Lordship stated that the decree  
 ought to stand and that there was no ground for the appeal.†

† *Ex relatione.*

ATTORNEY-GENERAL *v.* DEAN AND CANONS OF  
CHRISTCHURCH.1826.  
*July 4, 6.*

(2 Russell, 321—324.)

[See 23 R. R. 126 (Jacob, 474).]

CRAWSHAY *v.* COLLINS.†

(2 Russ. 325—349.)

1826.  
*July 10, 15.*  
*Aug.*  
*Sept.*Lord  
ELDON, L.C.

1828.

*June.*Lord  
LYNDHURST,  
L.C.  
[ 325 ]

A. being entitled, under a parol partnership agreement with B. and C., to three eighths of the capital and profits of the business, became bankrupt, being at the time indebted to the partnership in respect of bills in which the partnership name had been used for his personal accommodation: the assignees claimed a share of profits made subsequently to the bankruptcy, while the continuing partners insisted, that the bankrupt's interest in the profits ceased at that time; in consequence of this difference, no settlement of accounts between his estate and the partnership took place, and the assignees filed their bill; but B. and C., and afterwards C. alone, pending the litigation with the assignees, carried on the business for many years with the stock and capital which existed at the time of the bankruptcy, and stock and capital substituted in the usual course of trade for such former stock and capital, aided by the expenditure of considerable sums by C.: Held,

That the assignees of A. were entitled to three eighths of the profits which had been made or should be made until the concern was finally wound up, and to three eighths of the money to be produced by the sale of what remained in specie of the capital and stock:

That A.'s proportion of the profits was not to be lessened, nor the proportion of C. to be increased, in respect of the debt which A. owed to the partnership, or of the money which C. brought into the business, beyond his share of the original capital.

Where a dissolution of a partnership for a term of years is set aside as fraudulent, after the expiration of the term, the business having been in the meantime continued, the partner who had been improperly excluded, has a right to an account, not only till the end of the term, but till a final settlement takes place.

IN September, 1801, Collins, Noble, and Boughton entered into a parol agreement to be partners in the business of pump and engine manufacturers for an indefinite period. The capital, consisting of certain leasehold premises, tools, and utensils, money advanced by the partners, and sums allowed to Collins

† *Vyse v. Foster* (1874) L. R. 7 *In re Aldridge*, '94, 2 Ch. 97, 63 L. J. H. L. 318, 338, 44 L. J. Ch. 37; Ch. 465, 8 R. 189.

CRAWSHAY and Noble for the expence of two patents obtained by them  
 v. respectively and used in the business, was fixed at 5,333*l.* 6*s.* 8*d.*,  
 COLLINS. of which three eighths were considered as the share of Collins, three eighths as the share of Noble, and two eighths as the share of Boughton. On the 21st of July, 1802, they agreed to diminish the capital by one fifth: and, accordingly, Collins and Noble drew out, each, 400*l.*; and Boughton, 266*l.* 13*s.* 4*d.* On the 7th of October, 1803, Noble became bankrupt; and the advertisement of his bankruptcy appeared in the *Gazette* of the 7th of December, 1803. At the date of the bankruptcy the value of the leasehold premises, tools, implements, and goods manufactured or in a state towards being manufactured, amounted to 3,053*l.* 8*s.*; the money in \*their banker's hands, to 35*l.*; the debts due to the partnership, to 6,572*l.* 1*s.* 11*d.*; and the debts due from it, to 2,682*l.* 11*s.* 9*d.* The sums brought in by Noble amounted to 4,313*l.* 12*s.* 4*d.*; the sums drawn out by him (including the 400*l.*), to 2,929*l.* 5*s.* But, prior to the bankruptcy, he had also received 1,397*l.* 14*s.* 2*d.* in notes and bills drawn or indorsed in the partnership name for his private accommodation, and which Collins had been obliged to pay.

[ \*326 ]

The profits of the business up to the 7th of October, 1803, were estimated at 3,053*l.* 2*s.* 0½*d.*

After the bankruptcy, and during the suit which was subsequently instituted, Collins and Boughton, and afterwards Collins alone, carried on the business, and in particular continued to supply certain articles for the use of the navy under a very profitable contract, determinable on notice, which the partnership had entered into with the commissioners of the Navy Board. The amount of the profits of the business thus carried on, from the date of Noble's bankruptcy to the 1st of March, 1810, was calculated by the Master at 23,402*l.* 2*s.*

Assignees of Noble's estate having been chosen, various communications took place between them and Collins with a view to the settlement of Noble's claim on the partnership. Collins contended that Noble's right to a participation in the profits of the concern ought not to be carried beyond the 25th of December, 1803, up to which time the accounts of stock had been taken, upon the appearance of the advertisement of the

bankruptcy ; and he was willing to pay immediately what should be found due on an account taken upon that principle. The assignees, on the other hand, contended, that their right to share in the profits must continue till \*the final adjustment of the concern, and the payment of the balance due to them. To this principle of taking the accounts Collins refused to accede ; though he offered to pay a gross sum in addition to the balance which might be found due on an account taken on the principle proposed by him. The negotiations for an amicable settlement were finally broken off in June, 1804 ; and, on the 6th of August, 1804, the assignees filed their bill.

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The various proceedings in the suit, together with the minute details of the case, are stated in the Reports of Mr. Vesey,<sup>†</sup> and Messrs. Jacob and Walker.<sup>‡</sup>

After a succession of references and reports, the cause was heard on exceptions and further directions.

The questions discussed in the repeated arguments, which took place at the Bar, related principally to the following points :

Whether the assignees were entitled to share in the profits of the concern after the bankruptcy of Noble ; and whether such right of participation, supposing it to exist, extended to all the profits which had been made, or should be made till the accounts of the business were finally settled and the balance due to them was paid or ceased at any intermediate time subsequent to the bankruptcy :

Whether the interest of the assignees of Noble in the profits of the partnership after his bankruptcy was to be estimated at three eighths of the whole, or was to be measured, from time to time, or at any time, by the proportion \*which the sum coming due to Noble, on a settlement of all his dealings with the partnership, would have borne to the sum coming due to Collins, or to the sum actually employed in carrying on the business :

[ \*328 ]

How far the proportional interest of the assignees in the profits of the concern was to be affected by the circumstance that Collins had employed in it large sums of money, besides his original share of the original capital ; and that the prosperity of the business had been produced by his personal labour, attention

<sup>†</sup> 10 R. R. 61 (15 Ves. 218).

<sup>‡</sup> 21 R. R. 168 (1 J. & W. 267).

CRAWSHAY and skill, during a long series of years, throughout the whole of  
 COLLINS. which Noble and his assignees incurred no risk or trouble in  
 respect of the trade, and contributed no capital to it, beyond the  
 amount of the sum which Noble, at the time of the bankruptcy,  
 would have been entitled to draw out, if the account had been  
 then finally settled.

In the argument, in addition to the authorities mentioned in  
 the reports of Mr. Vesey, and Messrs. Jacob and Walker, the  
 case of *Smith v. De Silva*† was cited.

July 10.

THE LORD CHANCELLOR :

This is a case of very great importance and of no small  
 difficulty, and certainly has been felt by me as such, whenever I  
 have looked at it.

[ \*329 ]

The bill was filed by three gentlemen, as assignees of the  
 estate and effects of Mark Noble, a bankrupt, against William  
 Collins and Thomas Boughton, who had been the partners with  
 Mark Noble in a trade \*carried on in a manufactory ; and I now  
 proceed to state what has taken place in this cause, with a view  
 to represent the circumstances of the case as they must be  
 considered with reference to what may be pronounced to be the  
 law, as it would have obtained, if, immediately after the dissolu-  
 tion of the partnership, the rights of the parties had been  
 ascertained—with reference also to the fact that their rights  
 were not then ascertained, and, up to this moment are not  
 ascertained—with reference to the nature of the business and the  
 employment of the stock or capital in the trade by the persons  
 who continued after the bankruptcy to carry on the concern—  
 and with reference to the conduct of the parties towards each  
 other, after the partnership was dissolved by the bankruptcy, as  
 affording or not affording a reason to apply a rule of law  
 different from the rule which would be applicable, if no such  
 conduct had taken place.

[Here his Lordship read several of the most material parts  
 of the bill.]

The bill further represented, that the business was carried on

† Cowp. 469.

upon a very extensive scale, and that at length Mr. Noble became a bankrupt. Now, there are various ways of dissolving a partnership. It may be dissolved by effluxion of time, by bankruptcy, by death, by notice of dissolution. And the question, which this case furnishes, is, in what manner, where there is a dissolution, (let that dissolution be by notice, by death, by effluxion of time, or by a party becoming bankrupt, and regard being had to the fact that every partnership which is in one sense dissolved, is in another sense not dissolved—that is to say, not dissolved till the partnership affairs are wound up),—the question, I say, is, How, under the circumstances of every case that can arise, and under the peculiar circumstances of this case are \*the accounts to be taken? How are they to be taken, in case of death, by the executors and the surviving partners; in case of notice or of dissolution by effluxion of time, between the living partners; and in the case of bankruptcy, between the assignees and the other partners?

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The bill proceeded to state, that the share of the capital belonging to Mr. Noble at the time of his bankruptcy was very considerable, and had ever since his bankruptcy been and still continued to be employed in the partnership business, in the same manner as it was prior thereto; and then it asserted the right of the assignees to have the property disposed of, and to have three eighth parts of all the profits that had arisen, not until the bankruptcy only, but up to the time of filing the bill, and until a final settlement should be made.

The defendants, Boughton and Collins (Collins is the person who is principally concerned), put in their answer, contending that Noble was not entitled to have an account taken down to the filing of the bill, and that the only account, which he was entitled to, was an account to the time of the bankruptcy. They resisted, therefore, the application in the extent in which relief was prayed by the bill.

When this cause came on to be heard a decree was made, which has been very much misunderstood: for it has been frequently cited as a decision of importance and of a peculiar nature, though unquestionably it decided nothing at all. That decree directed an account of all the dealings and transactions in



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the partnership between Noble and the defendants down to the date of Noble's bankruptcy, but without prejudice to the question—whether the plaintiffs, as the assignees \*of Noble, were entitled to a share of the profits of the partnership business subsequently to the 7th of October, 1803.

Upon that reference the Master's report stated the following circumstances:—That the defendants and Mark Noble carried on the business of pump and engine makers, in the month of September, 1801, (previous to which time the business had been carried on by William Collins in partnership with other persons), in certain leasehold shops and buildings; That it was agreed between the parties at the commencement of their trading, that the capital (consisting of the leasehold premises, the tools and utensils of the trade, and the money advanced by the partners severally) should be estimated at 5,393*l.* 6*s.* 8*d.* three eighth parts of which were to be considered as the share of Collins, other three eighth parts as the share of Noble, and the remaining two eighth parts as the share of Boughton; that in 1802, it was agreed that their capital should be diminished by one fifth part; that, accordingly, Noble and Collins each drew from the trade 400*l.*, and Boughton 266*l.* 13*s.* 4*d.* by which the original capital of 5,393*l.* 6*s.* 8*d.* was reduced to 4,266*l.* 13*s.* 4*d.*; that the clear profits arising from the trade from the commencement of the co-partnership to the 7th of October, 1803, were estimated at 3,053*l.* 2*s.* 0½*d.*, of which profits Noble's three eighth shares amounted to 1,144*l.* 8*s.* ¾*d.*; that Noble drew out several sums of money, amounting in the whole to 2,929*l.* 5*s.*; that he had brought in sums of money, which (including his 2,000*l.* of capital) amounted to 4,313*l.* 12*s.* 4*d.*, exceeding the sums drawn out by 1,384*l.* 7*s.* 4*d.*, which excess, added to Noble's share of the estimated profits, made 2,529*l.* 5*s.* 7*d.*; that Collins, as one of the partners, had paid for Noble, in May, June, and September, 1803, two promissory notes and \*a bill of exchange, making together 1,397*l.* 14*s.* 10*d.* in which the partnership name had been used for the accommodation of Noble; that Collins after the 7th of October, 1803, had repaid himself this sum of 1,397*l.* 14*s.* 10*d.* out of the partnership property; that the stock in trade and capital of the copartnership, on the 7th of October,

[ \*332 ]

1803, consisted of the leasehold shops and buildings, with the tools and utensils, and the goods manufactured and unmanufactured, and were then of the estimated value of 3,053*l.* 8*s.* 0½*d.*; and that Noble's share of that stock and capital amounted to 1,145*l.* 0*s.* 6*d.*

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That report ascertained what was the original capital of each of these gentlemen, and what had been the amount of the profits up to a specified time; but it is quite obvious, that ascertaining the amount of the capital at first, and the subsequent amount of the profits up to that period, could not decide what were the rights of the parties; because the rights might depend upon what demands any of the partners had against any of the other partners in respect of debts contracted due to the partnership, of money abstracted from the partnership, and of those various other circumstances which continually occur in partnership dealings.

The case in that stage was argued by *Sir Samuel Romilly*, *Mr. Hart*, and *Mr. Cooke*, for the plaintiffs; and, on the other side, by the present Lord Chief Baron, and the present Vice-Chancellor, and *Mr. Roupell*, for the defendants.

[The LORD CHANCELLOR here read some parts of the argument and judgment from *Mr. Vesey's Reports*, and mentioned, that there were particular circumstances in the case of *Hill v. Burnham*, which is there cited.† He referred also to the dictum of Lord HARCOURT in *Brown v. Litton*,‡ that, "if one of two joint traders dies, and the other survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade."]

[ \*333 ]

It will be found, I think, continued the LORD CHANCELLOR, that the opinion I gave on that occasion, certainly not without some anxiety, was right; but that very anxiety prompted me to take a great deal of care to predicate nothing which could be supposed to apply to all cases of partnership that might exist. There is one proposition, however, which, perhaps, is stated too generally: I have there said,§ that "an executor has a right to

† See 10 R. R. 63, 64.

§ 10 R. R. 66 (15 Ves. 227).

‡ 1 P. Wms. 141.

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have the value ascertained in the way in which it can be best ascertained—by sale.” But, upon turning over this matter more carefully in my mind, though I think the proposition, as a general proposition, may be stated to be right, I am ready to admit, that there may be circumstances, both in the course of dealing between partners, and after one of the partners is dead, or has ceased to be a partner, which may constitute a case, in which that rule may not be capable of being applied.

By the decree made in July, 1808, it was declared, that the promissory notes and bill of exchange mentioned in the report were to be considered as items in account, to be debited against Mark Noble; and, without prejudice to any question, it was further ordered that it should be referred to the Master to inquire, whether there were any and what profits made since the 7th of October, 1803, by any and what use or application of, or by means of, the stock in trade and capital of the partnership business, as the Master found the same \*to have been constituted by his former report, or should, upon reviewing his report as to such stock and capital, find the same to have been then constituted; and the Master was to be at liberty to state specially any circumstances as to the stock and capital on the 7th of October, 1803, or as to any profits made or alleged to have been made since that time, or as to any contracts with any government board, or as to the patents or either of them, or as to any profits made or alleged to have been made from such contracts or the use of the patents or either of them; and the Master was to be at liberty to state in his report what should appear to him to be material, touching what, if any thing, had been done in or towards settling the claims of the plaintiff upon the partnership.

[ \*334 ]

The Master, in November, 1811, made his report in pursuance of that order. The report ascertained the amount of the stock and capital on the 7th of October, 1803, and the amount of the profits from time to time, down to the 1st of March, 1810: and it thereby appeared, that, from the 7th of October, 1803, to the 1st of March, 1810, the gross receipts of the partnership amounted to 82,275*l.* 13*s.* 2*d.*, and the disbursements to 58,873*l.* 11*s.* 10*d.*, leaving profits to the amount of 23,402*l.* 2*s.* It further stated, that, on the 2nd of March, 1802, Collins, in the name and on

behalf of himself and his partners, Noble and Boughton, entered into a contract with three of the commissioners of his Majesty's navy, on the behalf of his Majesty; that, by that contract, Collins, Noble, and Boughton covenanted and engaged to supply his Majesty's several yards at Deptford, Woolwich, &c. for the use of the royal navy, with all such chain-pumps of the late construction of Mr. Collins, (as well as with several other articles), as should, from time to time, be demanded of them by the commissioners; that the contract specified the prices \*which were to be paid for the articles; that it was to commence immediately, and to continue in force for twelve months certain, and, after that time, until six months' warning should be given in writing by either party to the other to discontinue the same; that, by the contract, certificates of the delivery of the articles were to be given to Collins, Noble, and Boughton by the officers of each of the different yards, and, after such certificates had been lodged at the navy office three months, bills were to be made out to them, payable in ninety days with interest thereon, at the rate of three-pence halfpenny per cent. per day; that the said contract remained in force, and that the stock in trade and capital of the partnership, together with the cash and credits thereof, on the 7th of October, 1808, had been used and employed, partly by Collins and Boughton, and partly by Collins alone, in carrying on the trade and business of pump and engine makers, and in complying with the terms and conditions of the contract. The Master added, that the defendant William Collins stated in his examination, that no profit had been made, since the 7th of October, 1808, by the use or application of the two patents, and that either the inventions, for which the same were granted, had not been used or employed since that date, or, if used or employed, no charge had been made in respect thereof; but that, on the other hand, Noble and Boughton stated in their affidavits, that Noble and Collins were, previously to the commencement of the partnership, in 1801, possessed of patents for inventions, applicable to ship-pumps; that, in order to prevent any collision of interest, they agreed to give up all the advantage of these patents respectively for the benefit of the partnership, and accordingly the inventions were used as occasion required; that

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his Majesty's ship the *Venerable* was fitted up with pumps of Collins's patent construction ; and \*that such patent inventions were the sole means of enabling the partners to procure the contract of the 2nd of March, 1802.

[Lord ELDON next read that part of the report, which stated the various negotiations for arrangement which had taken place between the parties. The material statements in it were, that Collins insisted that the right of the bankrupt to participate in the profits should not be carried beyond the 25th of December, 1803, when the account of the partnership stock was taken shortly after the advertisement of Noble's bankruptcy in the *Gazette* of the 7th of December ; that Collins afterwards offered an additional sum ; that the assignees, on the other hand, insisted that the bankrupt was entitled to a share of the profits down to the time when the affairs of the concern should be ultimately adjusted, and the money paid ; and that Collins declared that nothing but a decree of the LORD CHANCELLOR should induce him to submit to such a demand.]

These circumstances, continued his Lordship, seem to me to be of great importance in the decision of the present question. Here is an offer made on the part of Collins ; the parties do not agree to it ; they quarrel upon one point, and upon one point alone. Collins says " The profits shall be valued only up to the time of the bankruptcy : " the assignees say, " No, the profit shall be valued up to the time when the settlement is made : " Collins replies, " No, the LORD CHANCELLOR shall decide that point." The matter went off on that difference of opinion ; and certainly that difference of opinion comes to be in this case a very leading matter for the Court to give its attention to, in decreeing upon the demand of the plaintiffs and upon the defence made to it in this answer.

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When the matter came again before the Court, it was found necessary to direct another reference to the Master, to inquire whether any and what profits had been made, since the 1st of March, 1810, by any and what use or application of, or by means of, the capital and stock in trade of the copartnership.

All these references point out the anxiety of the Court to know, whether the profits were actually made by the application of the funds that belonged to the bankrupt as a member of the partnership.

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That reference produced the report of the 4th of May, 1818. Some sums of money were ordered to be paid into Court, as it were, by consent: and it was subsequently ordered, that it should be referred back to the Master to review his report of the 13th of November, 1811; and he was to state, not only what was capital at the time of the bankruptcy of Noble, but what the stock in trade consisted of at that time, and any other special circumstances; and, further, the Master was to set a value on any particular subject in dispute, which either party should think he had erroneously included or excluded.

This order was made in consequence of a very elaborate argument with respect to the distinction between capital and stock in trade.

The Master then made another report; by which he stated, that it was agreed, at the commencement of the partnership, that the capital should consist of certain particulars, amounting together to the estimated sum of 5,333*l.* 6*s.* 8*d.* The items comprised in this estimate were the following:—

The leasehold premises, agreed on the commencement of the partnership, to be valued at . . .	£1,200	0	0
Tools, utensils, goods manufactured, unmanufactured, and in state of manufacture at that time, also agreed to be valued at . . . . .	1,591	7	4
The use of the patents, on which no value was set.			
Cash advanced by, or allowed to, the copartners in the respective accounts . . . . .	2,541	19	4
Total . . . . .	£5,333	6	8

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The Master further found, that, at the time of the bankruptcy of Noble, the capital of the copartnership was of the

CRAWSHAY *v.* COLLINS. value of 4,266*l.* 13*s.* 4*d.*, which was made up of the following items :—

The leasehold premises . . . . .	£1,200	0	0
Tools . . . . .	480	0	0
Unmanufactured goods . . . . .	667	7	0
Manufactured goods . . . . .	668	14	9
Goods in a state of manufacture . . . . .	42	6	3
Cash in the bankers' hands . . . . .	350	17	0
So much of the debts owing to the partnership as amounted to . . . . .	862	8	4
The use of the patents, on which no value was set.			

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£4,266 13 4

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This capital, the Master stated, was, with the rest of the partnership property, subject, at the date of the bankruptcy, to the payment of the partnership debts. He further found, that the stock of the copartnership at \*the time of the bankruptcy consisted of the use of the two patents, the leasehold premises, tools and implements, goods manufactured, in a state of being manufactured, and unmanufactured ; that this stock was, in the whole, of the value of 3,053*l.* 8*s.* ; that the debts, at the time of the bankruptcy, due and owing to the trade, exclusive of the money in the hands of their bankers, amounted to the sum of 6,572*l.* 1*s.* 11*d.* ; and that the debts at the same time due from the trade amounted to the sum of 2,682*l.* 11*s.* 9*d.* The Master also stated, that, in estimating the capital brought in, sums of money were allowed to Collins and Noble in reference to the expenditure by which they had been enabled to procure their respective patents. And it would be very difficult to say, that the patents were not part of the capital or stock in trade, when the expense of procuring those patents was considered as stock brought into the trade.

I may observe, further, that there is in one of the reports a statement, to which I have already alluded, of the circumstances relative to some bills of exchange, upon which Noble had procured money on the credit of the partnership, and which Collins afterwards took up. One question in the cause may be, what

ought to be the effect of that transaction in arranging the affairs of the bankrupt?

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There were two exceptions taken to the report,<sup>†</sup> and those exceptions were argued; but it was understood \*that the effect of what was contended for, on each side, in respect of those exceptions should be decided upon hearing the cause for further directions.

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I have now stated the whole substance of the case; and it certainly furnishes a question of very considerable importance to the commercial world.

One or two cases were mentioned, which it appeared to me very difficult to apply as giving the rule of decision here:—I mean the cases of *Brown v. Vidler*;<sup>‡</sup> and *Cook v. Collingridge*.<sup>§</sup> Unless my memory misleads me, I think I may state that the former was a case, in which the Court found that a dissolution of partnership was fraudulently brought about. The Court was bound to \*set aside that dissolution of partnership; and, in setting aside the dissolution, it was clear that the consequence must be, that, until

[ \*341 ]

† The exceptions were the following:—

1st, "For that the Master hath found, that, on the 21st of July, 1802, William Collins, Mark Noble, and Thomas Boughton agreed to diminish their capital by one fifth part thereof, and that William Collins accordingly drew out therefrom the sum of 400*l.*, and Mark Noble the like sum of 400*l.*, and Thomas Boughton the sum of 266*l.* 13*s.* 4*d.*, by which the amount of the partnership capital, as originally constituted, was reduced to the sum of 4,266*l.* 13*s.* 4*d.*; and it did not appear to him that any further sum was taken out of the said capital by any of the partners after the 21st of July, 1802, and before the 7th of October, 1803: whereas the Master ought to have found, that, after the 21st of July, 1802, and before the 7th of October, 1803, the said Mark Noble had drawn out of the copartnership capital the whole of his original capital, with a sum beyond of 52*l.* 15*s.* 10*d.*, and that William Collins had supplied the partnership

with all that Mark Noble had so drawn out, together with other sums.

2ndly, "For that the Master had found, that, at the time of the bankruptcy of Mark Noble, the capital of the copartnership of Collins, Noble, and Boughton was of the value of 4,266*l.* 13*s.* 4*d.*, and consisted of the use of the patents, the leasehold premises, the tools, implements, and goods, manufactured, unmanufactured, and in a state of manufactory, certain sums of money due from the commissioners of his majesty's navy and several private persons, and money in the hands of their bankers, the particulars whereof he had set forth in the second schedule to his report: whereas the Master ought to have found, that, at the time of the bankruptcy of Mark Noble, the capital of the copartnership was of the value of 10,074*l.* 18*s.* 4*d.*, including particularly therein not the sum of 862*l.* 8*s.* 4*d.* as a part only, but the whole of the sums of money then due and owing to the copartnership."

‡ 15 Ves. 223*n.*

§ 23 R. R. 155 (Jac. 607).



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the term, for which the partnership was to subsist, should expire, the person, who had been put out of it by undue means, would be still considered as a partner. But a further question arose there, which was, whether, that term having expired, the party, who had been put out, was entitled to any share of the profits made after the expiration of the term? And I think I am accurate when I state my recollection of it to be, that, inasmuch as the dissolution had been brought about by undue means, and inasmuch as the right to be considered as a partner could not be said to exist, till it was set up again by a decree of this Court, it followed of course, that nothing could have been done, after the term had expired, which would have entitled one partner to exclude the other, till a settlement of accounts had taken place.

With respect to the case of *Cook v. Collingridge*, it might be said to consist of a specialty of this nature—that, although there had been a purchase made of the interest of a person concerned in a partnership, the purchase was made under such circumstances that this Court would not allow it to stand. It followed that the interest of the original partner, or of those who represented him, could not be displaced by that purchase; and, not being displaced by it, the interest could not but continue.

[ \*342 ] Nothing can be more mischievous to persons engaging in commercial transactions than not to take care to settle by deed, when they enter into partnership, all the questions which may arise under the various cases that may probably occur every day, when those partnerships come to a conclusion. For I believe that \*it is very difficult to lay down any general rule on the subject. The first question, which falls to be considered in such cases, is, first, what is the law as to settling the accounts, where there is not a provision made in the partnership deeds, if the parties proceed to settle the accounts at the moment the partnership ceases to exist? The next question is, what is to be the rule, provided they do not immediately proceed to settle the accounts and to arrange the affairs between them? Perhaps it will be found, that the rule must be applied in each particular case (when you have laid down the general rule of law) according to the conduct which the parties pursue—according to what they do, and according to what they forbear to do.

The question is, what interest the assignees of Mr. Noble have in the profits of a trade carried on since his bankruptcy. I cannot forbear intimating once more, that commercial men, when entering into partnerships, should advert to the necessity of providing by express covenants in what manner the affairs of the partnership are to be wound up with reference to their respective interests, whenever there shall be what may be called—but what is not in effect—an end of the partnership. A partnership may expire by death, or by effluxion of time, or by notice, or by the bankruptcy of a partner: but, in all these cases, though, in a certain sense of the word “expiration,” a partnership does so expire in each and every of them, yet, in most instances a partnership does not and cannot then expire to all purposes. In some, it may not expire for years after the period in which, in one sense of the words, we say it does expire; and it must depend upon the nature of the partnership, in what way it is to be carried on during the period in which it is to be wound up. If it expires by bankruptcy, there are introduced into it, \*as persons interested in the manner of winding it up, the assignees of the bankrupt. If it expires by death, there are introduced in like manner the executors of the deceased partner, who may be stated, though certainly not in a very correct use of the term, to be a sort of assignees of the deceased partner. When it expires by notice, it may happen, that in many cases the party, who gave the notice, may die long before the time arrives when it may be said to be quite dissolved, and his executors may become partners in the concern. In short, in every species of dissolution which may take place, in different events, persons in the course of time may be introduced into the partnership, with reference to whom accounts must be settled much in the same manner as it would have been necessary to have settled them with the original partners.

It is, therefore, of the last importance, that all partnerships should subsist, if possible, upon written articles: and that these written articles should lay down a clear rule, in what way the interests of the partners, in the different events that may occur, are to be disposed of. It is quite obvious that, in some of the magnificent partnerships which are carried on in this

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country, if they were dissolved to-morrow, there would be a necessity for knowing in each of them, what rules of equity were to be applied to them, not during months, but during many years, until all the concerns of the partnership could be wound up. And when you come to consider, that, after the partnership is nominally ended, money may be supplied by one partner and labour may be supplied by another, I feel that I cannot possibly state too strongly the necessity of all commercial men shutting out the interference of this Court, by laying down, in their own articles, what is to be done in their respective cases.

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After a very anxious consideration of this subject, I believe that it will be found, that the rule, which is to be applied, must be deduced in almost every case from the particular circumstances of that very case. I think it very advisable, as far as the law will permit, where partners have placed themselves in situations of so much difficulty for want of providing a clear rule for themselves, to give effect to what may be called conduct—as, for instance, offers made by one party to another to settle their affairs after the dissolution. But, according to my view of the circumstances of this case, I cannot find, in what passed between these parties, any ground for saying judicially, that what did so pass put an end to the partnership. It is true that the parties here unfortunately split upon a circumstance of no greater moment than this—that one of them said, about a year after the bankruptcy of Noble, "I am ready to settle, provided the profits shall stop at the time of the bankruptcy of Noble;" and the other said, "No, we will not accept of those terms; the account of profits shall not stop at the bankruptcy of Noble, but shall be continued to this time." But I think, regard being had to the circumstances of this case, and the property with which the partnership was carried on, that Mr. Collins had no right to say, that the account of the profits should stop at the time of the bankruptcy, and if he was not justified in saying that it should stop at the time of the bankruptcy, I have not been able to find any other period, anxiously as I have been looking for it, at which the account was to stop, subsequently to the time at which the offer was made and refused.

Now, in this particular case, I take it to be established by the

Master's report, and by the other documents before me, that, whether you call it stock, or whether you call it capital, the materials, with which the business \*was carried on after the bankruptcy of Noble, consisted in fact of the patents, the leasehold property, the tools and utensils, &c., of the old partnership, and were materials, which, though of course admitting of fresh supplies, were, as to what I may call the substratum of stock, alike the property of Noble, Boughton, and Collins at the bankruptcy. And I cannot bring myself to think, that, if it be clearly made out that a business is carried on with the property which belonged to a deceased partner, for instance, by the surviving partner, and no particular circumstances occur to vary the rule, the mere accident of one man surviving the other can authorize him to say, "I shall carry on the trade by the application of the funds of the partnership, at the hazard of the funds of the partnership, and I shall have the whole of the profits, and you shall have no share of them." There may undoubtedly be occasion for making claims in the nature of just allowances; but I cannot bring myself to think, that the interest, which at law survives in a continuing partnership, survives in such a sense as to cut down the rule of equity, and that the continuing partners shall have to account for nothing but the value of what the share was at the time of the death or bankruptcy of the other partner. Even if you were to lay down the rule in that way, still you would have to ask yourself, how is that value to be ascertained? It cannot be done by the surviving partner choosing to say, "I shall take it at such a value." There must be some way of valuing it, so as to give the party retiring the complete value; and there must be some way in which this Court will direct that valuation to be made.

It is clear, upon what is before me in this case, that the patents of Noble and Collins were, in truth, part of the partnership property; that, whether those patents were worth any thing or nothing to the world, \*they were the media through which the parties procured the contracts with Government; that these contracts were made in the names of Collins, Noble, and Boughton, and, when the payments on account were made by Government, they were made in bills payable to Collins, Noble, and Boughton;

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that the contract went on for several years, producing fruits, which I consider fruits of the partnership property; and that all the property, which belonged to the partnership at the bankruptcy of Noble, was employed in carrying on the trade afterwards. It appears to me also to be quite clear, that Noble had an interest in the partnership, and that a sum would have been found coming due to him, even if the account had been taken immediately after the bankruptcy, and if, in that account, credit had been given to the partnership for those bills on which Noble had raised money for his own use. There might be a question whether that was not a transaction between Noble in his individual character and Collins in his individual character; but, even taking it that the partnership had a right to say, that it should have credit for these sums, still I think it would have been found there was a residuum of interest in Noble.

This, therefore, is a case in which the surviving partner has made profits by the use of the funds which belonged to the partnership itself. Then another question arises:—if he has added funds of his own to those funds, is that circumstance to vary the rule? Are we to say, “Because you have added funds to the partnership funds in putting the partnership funds in hazard, your addition to those funds shall bring to you, and take away from others, all the profits which have arisen from the property of the original partnership, which was, in truth, the foundation of the concern?” Or, on the other hand, is not this the more equitable rule: that you \*shall consider what you have added to the partnership funds as a debt due to you from it, which shall diminish the profits, or that it shall be made the subject of a claim for just allowances.

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My opinion goes upon the particular circumstances of this case, and I do not lay down any principle which will decide any other case. I say this is to be considered as a continuing partnership: it was the misfortune of Mr. Collins that he did not take the means of putting an end to it: there was no period at which he might not have come to this court, and have put an end to it; but, as the circumstances stand, I cannot now see any period at which the taking of the accounts can stop. He must have a due allowance for what he has advanced. Where a sum is advanced

as a loan to an individual partner, his profits are first answerable for that sum; and if his profits shall not be sufficient to answer it, the deficiency shall be made good out of his capital; and if both his profits and his capital are not sufficient to make it good, he is considered as a debtor for the excess: and so it must be here. As to any claim for personal labour, and other just allowances, all these just allowances can be taken into consideration in the account.

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There were repeated discussions on the minutes of the decree.

By the decree, as finally settled by Lord ELDON, it was declared:—"That, having regard to all the circumstances of this case, the three-eighth parts or shares of Mark Noble in the partnership ought to be considered as continuing, notwithstanding and after his bankruptcy; and it was ordered, that the Master should inquire and \*state to the Court, what profits had been made by carrying on the said business since the date of his last report of profits made therein; and that the Master should inquire and state, how much of the profits reported to have been made by his former report, and of the profits which he should find to have been made since his said last report, had been made in each and every of the several years in which such profits had been made; and the consideration of interest upon what profits should appear to have been made was reserved, till after the Master should have made such report [consequent directions were added in the decree].

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After Lord ELDON's resignation, a petition of re-hearing was presented, and was heard before Lord Lyndhurst.

1828.  
June.

*Mr. Horne, Mr. Roupell, and Mr. Beames, for Collins.*

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*Mr. Sugden, Mr. Bickersteth, and Mr. Lee contrd.*

Lord LYNDBURST affirmed Lord ELDON's decree.

1826.  
July 26, 27, 29.

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# CAPES v. HUTTON.†

(2 Russ. 357—361.)

Articles, under which A. had served his clerkship to an attorney, contained a proviso, that A. should not practise within a certain district; and also a covenant on the part of his father, that A. should, within a month after he came of age, execute a bond in a specified penalty to ensure his fulfilment of the proviso; A., who was an infant at the time of the execution of the articles, served under them for three years after he attained his full age, but was never called on to execute any bond, and, with a knowledge of the purport of the articles, completed his clerkship, and afterwards began to practise as an attorney within the district from which the articles purported to exclude him: A motion for an injunction to restrain him from practising within that district was refused with costs.

THE plaintiffs, George Capes and George Hawkesley Capes, carried on the profession of attorneys, solicitors, and conveyancers at Epworth: the defendant, James Littlewood Hutton, had served his clerkship under articles to them. These articles, dated the 23rd of November, 1819, and made between George Capes and George Hawkesley Capes of the one part, and John Hutton and his son James Littlewood Hutton of the other part, contained, in addition to the usual stipulations, the following clauses: “Nevertheless, such acceptance of the said George Capes and George Hawkesley Capes of the said James Littlewood Hutton into their service as their clerk, and the said covenant on the part of the said George Capes and George Hawkesley Capes hereinbefore expressed are understood and agreed by and between the said parties hereto to be, upon this condition, that the said James Littlewood Hutton shall not nor will not, at any time or times hereafter, either directly or indirectly, either by himself alone or in partnership with or in the name of any other person or persons, set up or practise in the profession of an attorney, solicitor, or conveyancer, or any or either of them, within the distance of twelve miles from the town of Epworth, or reside or keep any office, either by himself or in connection with or in the name of any other person or persons, for the practice of the profession or business of an attorney, solicitor, or conveyancer within the said distance from

† *De Francesco v. Barnum* (No. 1) (1889) 43 Ch. D. 165, 59 L. J. Ch. 151.

the said town of Epworth: or attend any \*market or markets within the said distance from the said town of Epworth, as an attorney, solicitor, or conveyancer, with a view to practise or procure business or employment in the said professions, or either of them: and the said John Hutton for himself, his heirs, executors, and administrators, doth, for the considerations aforesaid, hereby covenant and agree to and with the said George Capes and George Hawkesley Capes, their executors, administrators, and assigns, that the said James Littlewood Hutton (he hereby consenting) shall and will, within the space of one calendar month next after he shall attain the age of twenty-one years, duly make and execute unto the said George Capes and George Hawkesley Capes, or the survivor of them, at their request, costs, and charges, a bond in the penal sum of 2,000*l.*, with a condition thereunder written for making void the same, in case the said James Littlewood Hutton do not and shall not set up or practise in the profession of an attorney, solicitor, or conveyancer, or any or either of them, within the distance hereinbefore particularly mentioned and expressed, and containing such further restrictions as will be according to the true intent and meaning of these presents and of the conditions hereinbefore contained."

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James Littlewood Hutton attained his age of twenty-one years in February, 1821; but no application was made to him to execute any bond, and he completed the period of his clerkship without any further communication taking place on the subject. Shortly afterwards, however, upon his requesting the Messrs. Capes to deliver his articles to him, in order to enable him to be admitted as an attorney, they refused to part with them, until he executed a bond to the purport for which they had stipulated. He declined to do so; and, having obtained from the Court of King's Bench an order for the \*delivery of the articles, he was, in the latter end of Easter Term, 1826, admitted a solicitor and attorney, and began to exercise his profession in the town of Epworth.

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Upon this the Messrs. Capes filed their bill against James Littlewood Hutton, praying that the articles of agreement might be specifically performed according to the limited restriction



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from professional practice contained in them, and that an injunction might issue in the terms of the stipulation.

The bill, and the affidavit in support of it, alleged, that the defendant during the whole period of his clerkship had a copy of the articles, that he was perfectly acquainted with their contents, and that neither he nor his father had expressed any dissent from or objection to any clause contained in them.

The defendant, in a counter affidavit, alleged, that he had been informed by his father, that, before the execution of the articles, George Capes stated to the father, that it was a rule with him and his partner not to take any articulated clerk, without inserting in the articles a clause to prevent him from practising within twelve miles of Epworth, and that, in conformity with the rule, a similar clause must be inserted in the defendant's articles, but that it would never be enforced against him. He likewise stated, that he always understood that the restriction was inserted in his articles only in conformity with a rule adopted by the plaintiffs for their general conduct, which was not to be acted upon in his particular case; that, under these circumstances, he had never considered the restriction as in any manner binding; that he never, after coming of age, in any manner concurred in the covenant entered into by his father, against his practising in Epworth, or within twelve miles of that place; that, on the contrary, he always dissented from it, and never believed that any such bond as was stipulated for in the articles would be required of him. The father did not make any affidavit.

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The plaintiffs, in an affidavit made in reply, swore, that they never gave the defendant or his father any reason to suppose that the condition and covenant contained in the articles were not meant to be enforced.

The VICE-CHANCELLOR having refused with costs a motion for an injunction, the plaintiffs renewed the application before the Lord Chancellor.

*Mr. Knight*, for the motion :

The agreement, which the father entered into, was legal and

valid. The son, after he was of age, acquiesced in it, and took the benefit of that contract, to which a restriction on his future line of conduct was inseparably annexed. By that acquiescence he became, in equity, a party to the agreement; by adopting one part of the contract, he rendered himself liable to the obligations of the other part: and the plaintiffs have a right to call for the assistance of this Court to restrain him from acting in contravention of those articles, under which he continued to serve for years after he was of full age, and the benefit of which he at this moment claims and enjoys.

It is unnecessary to consider what weight ought to be given to the conversation alleged to have taken place between the defendant and his father; for, if there were any truth in the statement, the father would have made an affidavit in support of it.

*Mr. Bickersteth, contrà.* \* \* \*

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v.  
HUTTON.

[ 361 ]

The LORD CHANCELLOR was of opinion, that an injunction could not be granted, and

*Refused the motion with costs.*

## ATTORNEY-GENERAL v. MAYOR, &c. OF EXETER.

(2 Russ. 362—371.)

A corporation, which had been in possession of charity lands from 1629, admitted by their answer, that they had retained the surplus rents, and applied them to corporate purposes distinct from those of the charity, always charging themselves in their books of account with the sums so retained; and they submitted to account as the Court should direct; but no books were produced which went back farther than 1747; Held, that the corporation must be decreed to account from 1629.

Where, upon an account extending over an unusually long period of time, a large balance was found due from a corporation to a charity, the LORD CHANCELLOR referred it to the *Attorney-General* to certify, whether it would be proper that the charity should accept a less sum in lieu of the balance stated in the Master's report; and, the *Attorney-General* having certified that it would be proper that the charity should accept a sum less than one half of that balance, the certificate was confirmed, and a decree made accordingly.

In 1609, Nicholas Spicer conveyed lands to feoffees upon trust to apply certain sums annually to charitable purposes, and make

1826.  
July 5, 6, 19.  
Nov.

1827.  
April—May.

Lord  
ELDON, L.C.  
[ 362 ]

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OF EXETER.

small payments to some of the officers of the corporation of Exeter, and to employ the residue of the issues in lending on good security, for periods not exceeding four years, sums under 21*l.* to such of the freemen of Exeter as should be approved of by the mayor and aldermen. On the 20th of August, 1629, the surviving trustees executed a deed of feoffment conveying the lands to the mayor, bailiffs, and commonalty of the city of Exeter; and, on the 18th of the following November, livery of seisin was given. From that time the corporation had been in the receipt of the rents and profits of the charity estate.

[ \*363 ] In 1811, the present information was filed against the corporation of Exeter, praying that an account might be \*taken of the rents and profits of the charity estates received by them, and that proper directions might be given for establishing the charity.

The corporation by their answer stated, that they and their predecessors had been in possession of the charity lands from the time mentioned in the information, and had let them at small rents, with large fines, which had from time to time been received by them, and brought to account as part of the profits of the charity estates; that they had applied considerable parts of the rents and profits to the charitable purposes expressed in the indenture of 1609; that there had been in every year some surplus, the amount of which they believed would appear from the books of account of the charity; that they had always been ready to apply such surplus according to the provisions of the indenture of 1609: that, no application having been at any time made to them for such loans as were mentioned in that instrument, the surplus had been retained by them or by certain members of their body, who were appointed trustees or curators of the charity, and had been applied to the purposes of the corporation, and not to the purposes of the charity; that they had, from time to time, duly charged themselves in their books of account with the sums so retained by them and so applied to purposes distinct from those of the charity; and that they were willing to account for the same, and for the rents and profits received by them, in such manner as the Court should direct. They denied that the rents and profits of the estates had been

misapplied; unless the Court should be of opinion, that they and their predecessors, by borrowing the surplus rents and profits, and applying the same to purposes foreign to the charity (always charging themselves as debtors to the charity for the amount thereof), had been guilty of such misapplication; in which case they \*submitted, that such abuse or misapplication had been committed ignorantly, and that they ought not to be charged with wilful neglect or default by reason thereof.

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 OF EXETER.

[ \*364 ]

The earliest book of account mentioned in the schedule to their answer, or of which they were then aware, began in 1764; but an account-book commencing in 1747 was subsequently produced.

No witnesses were examined on either side; and, in 1813, a decree was made by the MASTER OF THE ROLLS, without any discussion at the bar, which directed an account to be taken of the rents and profits of the charity estates, and of the fines paid upon the renewals of leases, which had come to the hands of the defendants or of any person by their order or for their use.

In January, 1814, the defendants paid into Court 1,995*l.*, the balance appearing by the schedules to their examination to be due from them.

The corporation were not at the time aware of what the effect of the decree would be; and they were surprised to find, that, as no date was expressed at which the account was to commence, the Master considered himself bound to take the account from 1629, the time when they first entered into possession of the estates. They, therefore, while the proceedings were going on in the Master's office, presented a petition of re-hearing to Sir THOMAS PLUMER; † and he affirmed the decree of Sir WILLIAM GRANT. From that decree, and the order affirming it, the defendants now appealed. In the petition of appeal they insisted, that the accounts ought not to have been directed to be taken from any \*period more distant than the filing of the information; and, at all events, that the corporation ought not to have been

[ \*365 ]

† Jac. 443. It was originally intended to reproduce here some extracts from the judgment of the Master of the Rolls in the Court below

(see 23 R. R. 120), but on further consideration it is thought unnecessary to adopt that course.—O.A.S.

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 OF EXETER.

charged in respect of the surplus rents and profits admitted to have been retained by them, so far as the purposes, to which the same were stated to have been applied, were public and charitable purposes for the advantage of the city of Exeter and its inhabitants, although not strictly within the scope and intention of the indenture of 1609.

*Mr. Shadwell and Mr. Merivale*, for the appeal. \* \* \*

[ 366 ]

*Mr. Hart and Mr. Roupell*, *contra*.

THE LORD CHANCELLOR:

The complaint of this petition of appeal is twofold. First, it alleges that the account ought not to have been directed farther back than from the filing of the information; for that branch of the complaint there is not the least ground. Secondly, it insists that, even if the account is to be carried back to a more remote time, yet no account ought to be directed of so much of the monies belonging to this particular charity as have been applied to other charities, or to other public objects which were for the benefit of the city of Exeter. But the petition of appeal does not bring before the Court a third question, which has been argued at the bar, namely, whether, looking back to the pleadings and the books of account (if we can refer to them), we \*can limit the account so as not to carry it to the very remote date of 1629, but make it begin at the time to which the books go back.

[ \*367 ]

If the account is to be taken from 1747, it is the duty of the Court to say, why it goes back so far, and yet goes back no farther. When this Court limits an account of the rents and profits of charity estates to the time of filing the information, or to six years before that date, it does not act with reference to the Statute of Limitations. The principle upon which it proceeds is this, that it will not deal harshly with men, who, meaning to discharge their duty faithfully, have nevertheless mistaken it.

It is quite a different matter where defendants state in their answer, that they have borrowed the charity funds for other purposes, have kept an account of the funds so borrowed, and have from time to time debited themselves with the amount. In such a case it would be very difficult to say, that the account could be

limited either to the filing of the information, or to six years prior to that time; because the very reason, for which, under different circumstances, either of these periods is selected by the Court, is ousted by the statement of the defendants themselves. The difficulty of taking an account from a remote date is one of the considerations which has an influence on the Court in determining where the account shall begin. But, looking at the pleadings, how can we say, that even that difficulty exists here? For the defendants themselves allege that the account has been regularly kept.

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OF EXETER.

As to the suggestion that the monies of the charity have been applied to other public purposes, can the Attorney-General or the Court say here, "You have \*applied the charity monies to other than the charity purposes; you have not debited yourselves with those monies as sums borrowed from the charity; and, as you have acted in mistake, the account shall not be pressed against you?" Do not the defendants themselves say, in one place, that they have *duly* charged themselves—and, in another, that they have *always* charged themselves—with the monies which they retained out of the profits of the charity estates?

[ \*368 ]

I do not see how the admissions in the answer can be qualified by a reference to the books of account; or how the rule of accounting can be taken from those books.

THE LORD CHANCELLOR:

July 6.

I do not see how I can relieve the corporation, though I think there is much hardship in charging them to the extent to which this decree goes.

*The appeal was dismissed.*

The defendants had produced in the Master's office a number of old leases and counterparts of leases of the charity lands, some of which recited or referred to other leases: and, as there were no books of receipts or disbursements prior to 1747, the Master had charged the corporation, from the quarter-day prior to the 20th of August, 1629, with all the fines, heriots, and rents reserved by those leases; allowing them on the other hand, without vouchers, the annual payments directed to be made by the founder, together with various reasonable and probable items

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[ \*369 ]

of expenditure. After 1747, there were three successive books of account of the receipts and application of the profits of the lands, which had been kept by certain persons appointed by the corporation curators \*of the charity. The first of them did not begin with any balance as due, at that date, from the corporation: at the commencement of each of the other two, a balance was stated against the corporation. There were entries in them which debited the corporation with interest on the surplus monies borrowed or retained; and a resolution had been passed in December, 1802, that interest should be paid to the curator on the balance then due to the charity. Upon these entries, and upon that resolution, the Master had charged the corporation with interest to the amount of 2,004*l.* 1*s.*

The result of the account taken by the Master on this principle was as follows :—

Receipts from 1629 to 1747 . . . . .	£3,851 19 0	
Payments . . . . .	1,310 14 4	
	<hr/>	
Balance found due from the defendants in 1747 . . . . .		2,541 4 8
Receipts from 1747 to the date of the report in 1821 . . . . .	5,498 17 8	
Payments (including the sum paid into Court) . . . . .	2,819 15 8	
	<hr/>	
Balance accrued due from the defendants between 1747 and 1821		2,674 2 5
		<hr/>
Total balance (exclusive of the sum paid into Court) . . . . .	£5,215 7 1	
	<hr/>	

This balance the corporation, it was stated, had not means of discharging; in fact, they had been obliged to borrow the sum which had been paid into Court.

[ \*370 ] The defendants took twelve exceptions to the report. Of these the first was the most important, and it was the \*only one which was fully discussed. The purport of it was, that the Master ought not to have charged the defendants with any sums as

received before the 24th of December, 1747 (the date from which the books of account commenced), inasmuch as there was not sufficient evidence before him of any such receipt; and that, as it did not appear by the existing accounts that there was any balance due from the defendants on that day, he ought to have presumed that whatever sums had been received by them prior to that time had been properly expended.

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After this exception had been argued, and some of the other exceptions had been partially discussed, the LORD CHANCELLOR suggested, that the proper course, under all the circumstances of the case, would be, to refer it to the *Attorney-General* to consider, whether it would be proper that the charity should accept a less sum in satisfaction of the balance found due by the Master.

July 19.  
Nov.  
—

Accordingly that course was adopted; and, on the 16th of April, the *Attorney-General* (Sir Charles Wetherell) gave the following certificate:

“In consequence of an intimation from your Lordship, in the course of the argument on the exceptions, that it should be submitted to me for my consideration, whether (due regard being had to the circumstances disclosed in the pleadings and proceedings) it would not be advisable and expedient, that the charity should accept a less sum than the whole amount of the balance of 5,215*l.* 7*s.* 1*d.*, found, by the Master's report of the 6th day of August, 1821, to be due to the charity from the corporation, in satisfaction of such balance,—I have been attended by the counsel and agents of the relator, and by the counsel and agents of the defendants, and have heard the allegations of the parties by their \*counsel and agents; and, the counsel for the defendants having proposed that a sum of 2,500*l.* only should be paid by them, and accepted on the part of the charity, in satisfaction of the said balance, which not being objected to by the relator, upon the defendants paying and bearing their own costs of this suit, I have considered such proposal, and humbly certify to your Lordship, that in my opinion it will be proper, under all the circumstances of the case, that, upon payment of the said sum of 2,500*l.* by the said defendants, or on

[ \* 371 ]



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their giving good security for the payment thereof, and bearing their own costs of this suit down to the present time, they should be discharged from the said balance of 5,215*l.* 7*s.* 1*d.* so reported due from them, and thereupon all proceedings respecting the said balance should cease."

Upon this certificate and the Master's report, the cause was heard on further directions; and, by the decree, dated the 19th of May, 1827, it was ordered, that the exceptions should be overruled; that the certificate of the *Attorney-General* should be confirmed; and that the defendants should, on or before the 31st of July, pay 2,500*l.* into Court, or give good security for the payment of it, with interest from that day.

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### MAWMAN *v.* TEGG.

(2 Russ. 385—405.)

1826.  
*Aug.* 4, 5, 7,  
 17, 18, 21.

Lord  
 ELDON, L.C.  
 [ 385 ]

The Court will interfere to protect copyright from piracy, at the suit of plaintiffs, who appear to have a good equitable title, even though it should not be quite clear that their legal title is complete.

Mode in which the Court exercises its jurisdiction, where one work of compilation, such as an encyclopædia, copies matter from a preceding work of the same description.†

THE plaintiffs, claiming to be proprietors of a work entitled the "*Encyclopædia Metropolitana*," filed their bill on the 22nd of July, 1826, against Tegg, the proprietor of the "*London Encyclopædia*," praying that an account might be taken of the profits made by the sale of the latter work, and that Tegg might be restrained from printing and publishing any numbers of it containing any part of the articles comprised in the "*Encyclopædia Metropolitana*."

The "*Encyclopædia Metropolitana*," according to the statement of the plaintiffs, was begun in January, 1818, by Rest Fenner, and was intended to be completed in fifty parts. In May, 1819, when only five parts had been printed, he became bankrupt, being then, as was alleged, sole proprietor of the publication; and Mr. Baldwin and Mr. Mawman, two of the plaintiffs, were chosen assignees of his estate and effects. In August, 1821, the plaintiffs purchased the unsold copies of those five parts of the

† *Leslie v. Young*, '94, A. C. 335, is the latest reported decision on compilation copyright.

work, and Fenner's copyright in them; but no written assignment of the copyright was executed. They had since published twelve other parts.

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In January, 1826, Tegg published the first part of the work entitled the "London Encyclopædia," which was edited by the gentleman who had been the editor of the first five parts of the "Encyclopædia Metropolitana," and six other parts had been published subsequently. In March, the plaintiffs first discovered that many of the articles in Tegg's publication were copied verbatim, or \*nearly so, from the "Encyclopædia Metropolitana;" and they accounted for their delay in applying for the interposition of the Court by the length of time required for a careful comparison of the two works by the writers of the articles alleged to have been pirated.

[ \*386 ]

In support of the charge of piracy, a great many articles and portions of articles in the "London Encyclopædia" were pointed out, which were verbatim the same with corresponding articles in the "Encyclopædia Metropolitana," or differed from them only in slight and apparently colourable variations. In some of the passages referred to, accidental blunders and typographical errors, which had crept into the "Encyclopædia Metropolitana," had been transferred into the corresponding articles in the other work. A great proportion of the instances of the alleged piracy were taken from a dictionary of the English language, which formed a part of both works, and was, in both, conducted on the same plan.

In the affidavits sworn in opposition to the motion for an injunction, it was stated, that the plans of the two works were perfectly distinct, the "London Encyclopædia" adopting the alphabetical arrangement, while the "Encyclopædia Metropolitana," rejecting that arrangement as unscientific, was distributed on philosophical principles into four divisions—that they were intended for two classes of readers totally different, and were not likely to interfere with the sale of each other, the parts of the "Encyclopædia Metropolitana" being large and expensive quartos, while its supposed rival appeared in octavo volumes, which were sold for about one third the price of the greater work—that the passages in the "London Encyclopædia," which were referred to in proof

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[ \*387 ]

of the charge of piracy, had been printed from manuscript copy—and that, though the “*Encyclopædia Metropolitana*” \*had been consulted in common with other books, researches on the same subjects had always been made in other directions, and the information derived from it had never been used without correction or addition, amplification or abridgment.

Mr. Curtis, who had been the editor of the first six parts of the “*Encyclopædia Metropolitana*,” and was afterwards the editor of the “*London Encyclopædia*,” also stated in his affidavit, that, originally, one third of the former work belonged to him, one third to a Miss Richardson, and the remaining one third to Fenner; that he agreed to sell to Fenner his share of the work and copyright for 3,000*l.*; that he received from Fenner a bond for that sum, payable twelve months after demand; that he had attempted to prove the amount of the bond under Fenner’s commission, but his claim had been rejected, because no demand had been made prior to the bankruptcy; and that he had never executed any assignment of his interest in the copyright.

Aug. 4, 5.  
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The *Solicitor-General*, Mr. Spence, and Mr. Loraine, on behalf of the plaintiff, moved for an injunction; submitting, that, in respect of name and outward similarity, the “*London Encyclopædia*,” notwithstanding the difference of size, must be considered as a counterfeit of the “*Encyclopædia Metropolitana*,” so that they were entitled to an injunction on the principle of *Hogg v. Kirby*;† and contending, that, at all events, a case of unquestionable piracy had been made out, which entitled the plaintiffs to the injunction they asked.

Mr. Horne, Mr. Shadwell, Mr. Ching, and Mr. Swann,  
contrà :

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\* \* A great majority of the instances of the alleged piracy were taken from the lexicographical department. \* \* Compilations, like encyclopædias, were to be judged of by rules somewhat different from those which applied to compositions partaking more of the character of original works. They pro-

† 7 R. R. 30 (8 Ves. 215).

fessed to borrow from a great variety of sources; and if each author, from whom any matter was borrowed, had a right to complain in a court of justice, works of that class could no longer be conducted in the same way as had been customary hitherto. It was distinctly sworn, that the compilers of the "London Encyclopædia" had not availed themselves of the "Encyclopædia Metropolitana" in any way at variance with the usage of literary men: they had done no more than the complaining parties had themselves done. The "Encyclopædia Metropolitana" had borrowed largely \*from other works; it had borrowed largely from one work, the copyright of which belonged to the defendant. \* \* \*

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[ \*389 ]

Secondly. The parts of the "London Encyclopædia," which were alleged to be piratical, formed a very inconsiderable part of the whole publication; and even supposing the accusation to be true, was the whole work to be annihilated by the injunction of the Court? \* \* \*

Thirdly. The remedy by injunction being in such cases only auxiliary to the legal remedy, the party applying for it ought to show that he has a title on which he could recover at law. The title of the plaintiffs, according to their own statement, was not valid in either law or equity. The assignment of copyright ought to be in writing, 8 Ann. c. 19, s. 1,† 54 Geo. III. c. 156, s. 4.† \* \* \*

Further, it appeared in the affidavit of Mr. Curtis, that he never executed any assignment of his original one third share, and, as the price, for which he agreed to sell it, had not been paid, he had a lien on that share for his purchase money. As to Miss Richardson's share, it was included in an assignment made by her to Mawman, Baldwin, and another individual, not a party to the suit, in trust for the benefit of her creditors.

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In reference to the last point, the *Solicitor-General* denied that a defendant, who had not a shadow of right to use the matter of the "Encyclopædia Metropolitana," could require the plaintiffs, who had long been and still were in possession of that work and of the copyright of it as owners, and who swore distinctly that the property was theirs, to explain, for the satisfaction of his

† Rep. 5 & 6 Vict. c. 45, s. 1: See *Leyland v. Stewart* (1876) 4 Ch. D. 419.

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curiosity, the mode in which the title became vested in them. At the same time, if the Court wished for any explanation as to the nature or derivation of the title, they were ready to give it.

THE LORD CHANCELLOR :

[ \*391 ]

As to the hard consequences which would follow from granting an injunction, when a very large proportion of the work is unquestionably original, I can only say, that, if the parts, which have been copied, cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must \*suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me ; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame.

Aug. 7.

THE LORD CHANCELLOR :

There was in the first instance an attempt on the part of the plaintiff to say, that there was such a similarity in the title and form of the works, that the less should be considered as a counterfeit of, or affecting to be the same with, the larger. That proposition cannot be maintained ; it is impossible to bring the case within the principle of *Hogg v. Kirby*.† The ground on which the plaintiffs must stand, is, that the work of the defendant is a piracy of their work.

One objection relied on by the defendant was, that the plaintiffs had not shewn a title to the work for which they claimed protection. The plaintiffs offered, if the Court wished to be satisfied on that point, to supply any defect which might be supposed to exist in their title or in the evidence of their

† 7 R. R. 30 (8 Ves. 215).

title; but they insisted that they ought not to be required to supply what in truth was not wanted to cure any defect, merely because a defendant, who was appropriating to his own use what did not belong \*to him, called on them to do so. It does not appear to me, that, for the purposes of this motion, I need call on the plaintiffs for any explanation of their title. Originally there appear to have been three persons interested in the "Encyclopædia Metropolitana," according to such title as they had. Fenner had one third of it; Curtis (who is now the editor of the "London Encyclopædia"), another third; and a Miss Richardson, the remaining one third. Two of the plaintiffs, Mawman and Baldwin, are assignees of Fenner: and, whatever question there may be in some cases, whether an interest in copyright does or does not pass without writing, it would, I apprehend, be difficult to maintain that there must be an instrument in writing between the bankrupt and his assignees. Fenner's share, therefore, vested in his assignees. The subsequent transactions, by which, through a dealing with the assignees, the plaintiffs (including the assignees) acquired their interest, do not seem to me to be material on this occasion. If the assignees are trustees for the creditors, they have a trust to perform, and it is their duty to make the most of the publication for the benefit of the creditors; if they have themselves become owners by virtue of a purchase, they have a right to sue for the protection of their own interest. Whether, therefore, the assignees are trustees of the "Encyclopædia Metropolitana" for the creditors of the bankrupt, or are owners for their own benefit, is much the same thing as to the only question which the Court has to deal with at present.

Mr. Curtis, it is represented, sold his one third to Fenner, and took in payment a bond payable at a certain time after demand made; no demand being made till after Fenner's bankruptcy, his claim to prove upon the bond under the commission was rejected: and I am afraid it cannot be maintained, that he had a lien for the \*amount of the bond on the share which he had sold. As to Miss Richardson's share I have very little information: except only, that there appears to have been some arrangement, by which, as between her and the plaintiffs, they

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have been considered to be, and have acted as, proprietors of the work.

Another circumstance which has been pressed by the defendant, is the delay in filing the bill. That delay, it appears to me, is in a great degree accounted for by the necessity of comparing the whole of the two works, for the purpose of seeing how much of the "Encyclopædia Metropolitana" had been, in a substantial sense, taken from it, and infused into the "London Encyclopædia," before any application could be made to this Court.

In cases of this kind, the Court has first to decide whether there ought to be an injunction; and if there is to be an injunction, it has next to determine, whether the injunction shall be against the whole work, or only against part of it. The extent to which the injunction ought to go, must, in each case, depend on the particular circumstances of that case. Quotation, for instance, is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy affixed to it; but quotation may be carried to the extent of manifesting piratical intention.

It has been argued on behalf of the defendant, that there can be no such thing as monopoly in the plan and arrangement of works like those which are in question here, and more especially of the lexicographical parts of them. But though any man may publish a work of the same nature and species with the work of the plaintiffs, the question which always arises, is, whether he is not publishing a work which is partly theirs, and partly his? In considering that question, it is necessary to ascertain \*how much of the one book has been copied from the other; and many cases have established, that you cannot have better evidence of such copying than the circumstance which occurs in several of the passages here complained of—namely, the fact of blunders in the original book being transferred into the book which is accused of piracy. And I may add, that, when a considerable number of passages are proved to have been copied, by the copying of the blunders in them, other passages, which are the same with passages in the original book, must be presumed, *primâ facie*, to be likewise copied, though no blunders occur in them. But after the quantity of

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matter, which has been copied, has been thus ascertained, the quantity of matter, not piratical, with which the piratical matter has been intermixed, is still a circumstance of great importance. For, though this Court has long entertained the jurisdiction of protecting literary property by injunction, there may be much doubt, whether it would exercise the jurisdiction, where only a few pirated passages occurred, and would not rather, in such a case, leave the complaining party to his action at law.

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I do not find any case precisely in point, or where the question has arisen on a work of the very same kind with these. But it is difficult to distinguish, in fair legal reasoning, a work, such as these encyclopædias are, from other works to which the jurisdiction of the Court has been applied on the ground of piracy: sometimes, granting an injunction; at other times, ordering the accused party to keep an account; sometimes, directing a reference to the Master as to the contents of the respective works; sometimes, leaving the complainant to proceed with his action at law; sometimes, calling on the defendant to put in his answer, before the injunction is granted. Shall I, then, under the circumstances which are presented to me, grant the injunction before answer? \*or, shall I give the defendant leave to make an affidavit with respect to the extent to which the articles of the "Encyclopædia Metropolitana" have been copied in his publication? The plaintiffs cannot know to what extent the copying has been carried, unless they examine the whole work; and, even then, any representation, which they can make, must be matter of inference. But the persons in the employment of the defendant can state exactly, how much they copied, and what parts they copied, and can supply the Court with the knowledge of how the fact really stands, without leaving it to be collected from inferences more or less strong. I desire, therefore, to know, whether, on the part of the defendant, an affidavit will be offered, stating how far those parts of the "London Encyclopædia," which are exactly the same with parts of the "Encyclopædia Metropolitana," were or were not copied from the latter work?

[ \*395 ]

In consequence of this intimation, the gentleman who had



MAWMAN  
F.  
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superintended the compilation of the lexicographical articles in the "London Encyclopædia," made one affidavit, and the editor of the work another.

The former stated, that, although he had adopted from the "Encyclopædia Metropolitana" some few quotations and illustrations taken from previous writers, yet, in reference to original matter, he had in no instance copied merely from that work, but, in all cases where he had made use of it, had either abridged or amplified the same; and that, to the best of his belief, there was no single article in that portion of the lexicographical department of the "London Encyclopædia" which had been under his superintendence, that was not, in important particulars, different from any article in the "Encyclopædia Metropolitana," so as to become essentially a new and original article:—that, in seventy-five \*pages of the lexicographical portion of the "London Encyclopædia," not more than two lines were copied from the "Encyclopædia Metropolitana;"—that, though the sixth part of the "London Encyclopædia" contained 52,000 lines, the extracts of articles or illustrations in it, which had been taken from the "Encyclopædia Metropolitana," did not exceed in the whole 510 lines, scattered throughout the part, and did not compose the whole of any one article:—that, in using the "Encyclopædia Metropolitana" in the way he had done, he had not the most distant idea that he was infringing on any copyright:—that, as a literary man, he had always conceived, that, for the benefit and information of the public, he was entitled, in writing a dictionary, to avail himself of the labours of all his predecessors:—and that he believed, from the inspection of the "Encyclopædia Metropolitana," that the editors of that work had borrowed from other dictionaries and works of a like nature, to a much greater extent than he had from theirs.

The editor in his affidavit stated that, from nine parts of the "Encyclopædia Metropolitana," containing upwards of 227,000 lines, only 2160 lines had been adopted in the compilation of the "London Encyclopædia;"—that, in the first three parts of the latter work, containing 3400 articles, the accusation of piracy was confined entirely to the lexicographical

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department;—that a great proportion of the passages which the plaintiffs had selected as copied from the “*Encyclopædia Metropolitana*,” had not been taken from it, but from prior works, whence they had been copied likewise into the “*Encyclopædia Metropolitana* ;”—that many of the passages thus borrowed by the “*Encyclopædia Metropolitana*” had been taken from a work, the copyright of which belonged to the defendant;—that dictionaries of science and art uniformly compile and abridge very freely from preceding works, \*and particularly from each other;—that much of the matter, which, the plaintiffs alleged, had been pirated from them, consisted of passages on which they had bestowed only the labour of transcription;—and that he himself had been at great pains in arranging and digesting very considerable portions of this same matter.

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The case was again argued.

Aug. 18.

THE LORD CHANCELLOR :

I have looked minutely into almost every case relating to piracy of books, which has come before me either as counsel or as judge; but I do not recollect any one, whilst I was at the Bar, or since I have had the honour of sitting in judgment, which resembled the present. The cases which have occurred within my experience, have all been either cases, in which, by altering or destroying the title-page, the publication could go on, or where the parts, that were pirated, bore such a vast proportion to the whole of the work, that there was no difficulty in ascertaining, whether the work was or not upon the whole a piracy, or a piracy to such an extent that you could feel no uneasiness in granting an injunction; because, if you confined the injunction to the pirated part of the work, that part was so very considerable and so mixed up with the smaller part of the work, that, when it was taken away, there was nothing left to publish, and granting the injunction against the larger part was, in effect, destroying the whole work immediately.

The present case consists of circumstances, which, when I was considering such cases as I have before referred to, I have long foreseen might eventually happen. It is a case, in which the parties, as well as the Court, have experienced not a little

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difficulty, and have found \*themselves very much at a loss: for Mr. Mawman, in the first affidavit filed in this suit, with a view to account for the circumstances of the application not being made earlier, states how far he had gotten in endeavouring to bring before the Court what he hoped the Court would think sufficient to warrant it in granting the injunction, and how much time and labour had been required for that purpose. But, I must confess, that, notwithstanding all the pains which have been used, the inquiry as to how much has been pirated in this work has left us in a great degree to conjecture; or, rather, we are left to conclude, from passages which are shown to have been copied from the original work, how much more has been so copied. Now, where the Court has granted an injunction against the whole of a work, it has seldom, if ever, done so, without having first ascertained, either by its own inspection or otherwise, what was the quantity of matter pirated.

The quantity ought to be ascertained, in order to authorize the Court to say that no part of the piratical work should go on; and, on the other hand, nothing is more difficult than to grant an injunction against part of a work, although an action may be brought for pirating a part. It appears to have been Lord HARDWICKE's opinion,† that an injunction might be granted against the whole, although only part was pirated; and, in the instance of Milton's "Paradise Lost," with Newton's notes, although there was nothing new in that book except the notes, he was of opinion that he could grant, and did grant, an injunction against the whole book. There is a case of an action tried before Lord Kenyon,‡ in which a motion was afterwards made for a new trial; and there Lord KENYON states that the question, whether you could grant an injunction against the whole of a book \*on account of the piratical quality of a part, came before Lord Bathurst; and Lord BATHURST seems to have held, that you could not do so, unless the part pirated was such, that granting an injunction against that part necessarily destroyed the whole. Lord KENYON, who possessed great information on this subject, states himself to have been perfectly

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† 4 Burr. 2326.

6 R. R. 285 (1 East, 358), and *Trusler*‡ Probably *Cary v. Longman*, *v. Murray*, 6 R. R. 289 n. (1 East, 363).

satisfied with the opinion of Lord BATHURST, as bearing upon the judgment of Lord HARDWICKE and the other cases. In the case before Lord Kenyon, the declaration at law contained a count for publishing the whole work, and another for publishing a part; and Lord KENYON's direction to the jury seems to have been to find damages for publishing the part only.

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In the cases which have come before me, my language has been, that there must be an injunction against such part as has been pirated; but in those cases the part of the work, which was affected with the character of piracy, was so very considerable, that, if it were taken away, there would have been nothing left to publish except a few broken sentences. Now, the difficulty here is this—whether I have before me sufficient grounds to authorize me to say, how far the matter, which is proved (if I may use that word) to have been copied, is sufficient to enable me to decide how much I may enjoin against? And if I can be thus authorized to say how much I can enjoin against, then the question is—What will be the effect of that injunction applied to so much of the work, in the state of uncertainty in which we now are? Or whether, on the other hand, as the matter cannot be tried by the eye of the judge, I must not pursue a course which has been adopted in cases of a similar nature—namely, refer it to the Master to report to what extent the one book is a copy of the other, upon the comparison of all the numbers that have been published?

Another way of ascertaining the facts of the case is to send it to a jury; and, in either of those ways of disposing of it, the Court will order the defendant to keep an account of the profits in the meantime. But one difficulty in all these cases is that, though keeping an account of the profits may prevent the defendant from deriving any profit, as he may ultimately be obliged to account to the plaintiff for all his gains, yet, if the work, which the defendant is publishing in the meantime, really affects the sale of the work which the plaintiff seeks to protect, the consequence is, that the rendering the profits of the former work to the complaining party may not be a satisfaction to him for what he might have been enabled to have made of his own work, if it had been the only one published; for he would argue,

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that the profits of the defendant, as compared with the profits which he, the plaintiff, has been improperly prevented from making, could only be in the proportion of eight shillings, the price of a copy of the one book, to one guinea, the price of a copy of the other. If the principle, upon which the Court acts, is—that satisfaction is to be made to the plaintiff,—I cannot see, though I never knew it done, why, if a party succeeds at law in proving the piracy, the Court should not give him leave to go on to ascertain, if he can, his damages at law: or if, after applying the profits which are handed over to him by the defendants, he can show that they were not a satisfaction for the injury done to him, I cannot see why the Court might not in such a case direct an issue to try what further damnification the plaintiff had sustained.

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Under all the difficulties of this case, it seems to me that the proper way of proceeding would be, to send it to the Master to ascertain (he may make each book a sort of schedule to his report) all the parts of the “London Encyclopædia” which have been pirated from the “Encyclopædia Metropolitana.” This becomes the more \*necessary, because, although I cannot entertain any doubt that a man may pirate a dictionary, yet, when you consider what the language is which both Lord MANSFIELD and Lord ELLENBOROUGH have used in summing up to juries in respect to pirating dictionaries, charts, &c., it would be going a great way to say that the language of their directions does not suppose, that, in cases of this kind, something ought to be left to the jury as a matter of fact. In the case, for instance, of a dictionary, Lord MANSFIELD expressly says, that you are not merely to look at what is published in the one work being part of the other work, but that you are to consider whether the matter alleged to have been copied has, upon the whole, been used in such a manner as to shew (according to the language of Lord ELLENBOROUGH in another case), that the party meant to give to the public what might fairly be called a new work; or whether, on the other hand, in robbing the former author of so much of his work, he acted, as Lord ELLENBOROUGH expresses it, *animo furandi*.

These are extremely difficult questions for a court of equity to

determine ; and I therefore think, upon the whole, that this case must go to the Master in the first place, to ascertain the extent of the alleged piracy ; that the plaintiff should be put to bring an action forthwith ; and that an account should be kept of the profits of the “London Encyclopædia,” and, after all these matters are gone through, I think the Court will then be able to say, what, upon the whole, ought to be done, or ought further to be done.

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Observations have been made upon the nature of the title of Mr. Mawman and his twenty associates in this work. Whether the title be a good legal title in them or not, is one question ; but it appears to me that they \*have a complete equitable title ; and, if the defendants are to have the benefit of the delay which bringing the action may occasion, they ought to be directed to admit the legal title upon the trial of the action, because a court of law cannot try the equitable title.

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This is the general outline of the case, and it seems to me in its circumstances not sufficiently ripe and mature for any more positive declaration than what I have now stated.

\* \* \* \* \*

[The suit was compromised upon the payment of a considerable sum of money by the defendant to the plaintiffs.]

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On Appeal.

1821.

Nov. 22.

1826.

July 6, 7.

Aug. 1, 11.

1827.

Mar. 15.

April 3.

Lord

ELDON, L.C.

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# ATTORNEY-GENERAL v. THE MASTER AND WARDENS OF THE SKINNERS' COMPANY.†

(2 Russ. 407—448.)

A testator by his will, dated in 1538, after reciting that he had erected a free grammar-school at Tonbridge, did, for the maintenance and continuance thereof, give unto the master and wardens of the Skinners' Company various messuages, specifying their respective yearly values, which amounted in the whole to 60*l.* 13*s.* 4*d.*; then, proceeding to direct how the rents should be applied, he ordered that 20*l.* should be paid yearly to the master of the school, and 8*l.* to the usher; that the master and wardens of the Skinners' Company should visit the school once a year, for which they were to have 10*l.* yearly; that 4*s.* a week should be paid to certain almsmen; that 25*s.* 4*d.* yearly should be expended in coals, to be distributed among the almsmen; and that the renter-warden should have 10*s.* for his pains; the residue of the rents were to be employed by the master and wardens upon the needful reparations of the aforesaid messuages and tenements, and the overplus was to go to the use and behoof of the Skinners' Company, to order and dispose of at their wills and pleasures: Held, upon the recitals and language of two private Acts of Parliament, which the Skinners' Company had accepted,

That certain of the lands, the yearly rental of which in 1538 was 43*l.*, did not pass by the will, but were subject to a prior trust, which was exclusively for the support of the master and under-master of the school, and for the reparation of the said lands and tenements; and that the increased rents of those lands were to be applied to the maintenance of the school on an enlarged scale:

That the Skinners' Company were entitled to the rents and profits of the remainder of the premises mentioned in the will for their own use and benefit, subject only to the payments to the almsmen and renter-warden, to the payments for coals, and to contribution towards the expenses of repairing such part of the premises used for a school as had been originally erected for that purpose, as well as towards an increased sum of 200*l.* yearly allowed to the company for the expenses of visiting the school.

SIR ANDREW JUDD, having founded a free grammar-school in the town of Tonbridge, obtained, in the seventh year of Edward VI.,‡ letters-patent for its formal establishment. These letters-patent gave him the direction of the school, and the management of its possessions during his life, investing him for that purpose with a corporate character; and they ordained that, after his death, the master, wardens, and commonalty of the mystery of Skinners of London for the time being, should be and be called governors of the possessions, revenues, and goods

† *Attorney-General v. Wax Chandlers' Company* (1873) L. R. 6 H. L. 1. ‡ 1553.

of the free grammar-school of Sir Andrew Judd; that they should be a body corporate by that name; that they should have authority to appoint the master and under-master; that they should be capable of holding lands in mortmain of the \*yearly value of 40*l.* for the support and maintenance of the school, and that all the issues, rents, and revenues of all the lands, tenements, and possessions thereafter to be given towards the support of the school, should be converted to the support of the master and under-master of the school, and to the reparation of the said lands and tenements, and not to any other uses. Sir Andrew Judd was also declared capable of taking and holding lands, towards the support of the school, for his own life, with remainder to the Skinners' Company.

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In 1558, Sir Andrew Judd made his will, which, among other dispositions, contained a devise of certain lands to his wife for her life; remainder, as to some of them, to his eldest son and heir in tail male, and, as to others of them, to his second son in tail male. Then, after reciting that he had left various lands and tenements, particularly described, to descend to his son and heir, he proceeded in the following words:

“Whereas I, the said Sir Andrew Judd, have builded and erected a free grammar-school at Tonbridge, in the county of Kent, to have continuance for ever; for the maintenance and continuance whereof I give, will, and bequeath to the master and wardens of the fraternity of Corpus Christi, of the craft or mystery of Skinners of the city of London, all that my close of pasture, with the appurtenances, called the Sandhills, and lying and being on the backside of Holborn, in the parish of St. Pancras, in the county of Middlesex, being of the yearly value of 13*l.* 6*s.* 8*d.*; and all that my messuage or tenement, with the appurtenances, situate, &c., in the Old Swan Alley, in Thomas Street, in the parish of St. Pulteney, in London, being of the yearly value of 6*l.* 18*s.* 4*d.*, &c.; and also all that my messuage or tenement, with the appurtenances, situate, &c., in the parish of St. Alhallows, in Gracious Street, &c.; and also all that my messuage or tenement, \*with the appurtenances, in Grace Street, &c., which said two messuages be now of the yearly value of 7*l.*; and all that my messuage or tenement in Grace

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Street aforesaid, &c., of the yearly rent of 8*l.*; and all that my messuage or tenement, with the appurtenances, situate, &c., in Grace's Street, &c., of the clear yearly value of 53*s.* 4*d.*; and all that my messuage in Grace's Street, &c., of the yearly value of 40*s.*; and all that my messuage, &c., in Grace's Street, &c., of the yearly value of 4*l.*; and all that my new messuage, &c., within the close of St. Helen's, &c., of the yearly rent of 40*s.*; and all those my messuages, tenements, and gardens, with their appurtenances, &c., in the parish of St. Mary Axe, of the yearly value of 5*l.*; to have and to hold all and singular the aforesaid messuages, tenements, gardens, and other premises, with the appurtenances before willed and bequeathed, unto the said master and wardens, and to their successors for ever; and furthermore I give, will, and bequeath unto the said master and wardens of the said fraternity of Corpus Christi of the craft or mystery of the Skinners of London, one annuity or yearly rent of 10*l.* of lawful money of England, going out and to be yearly perceived and taken out of all that my messuage or tenement, with the appurtenances, in Grace Street aforesaid, in the parish of St. Peter's, in Cornhill, called the Bell, to have, hold, perceive, and take the said annuity or yearly rent of 10*l.* unto the said masters and wardens, and their successors for ever, at four times in the year, &c.; and I will, that the rents, issues, revenues, and profits, yearly arising, renewing, and coming of the messuages, lands, tenements and other the premises given, willed, and bequeathed unto the said master and wardens and their successors, in manner and form before expressed, shall be by them and their successors employed and bestowed in manner and form following; that is to say, first, I will that the said master and wardens for the \*time being shall yearly content and pay to the school-master of my said free grammar-school at Tonbridge aforesaid, for the time being, for his stipend and wages, 20*l.*, at four terms in the year, that is to say, at the feasts of St. Michael the Archangel, the Birth of our Lord God, the Annunciation of the Blessed Virgin, and the Nativity of St. John the Baptist, by even portions, or within one month next after every of the same feasts: Item, to the usher of the school 8*l.* of lawful money of England, at the said four terms, or within one month, &c. as

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aforesaid, by even and equal portions : Item, I will that the said master and wardens for the time being shall, once in the year, for evermore, ride to visit the said school, and there to see and consider whether the schoolmaster and usher of the said school do their duties towards the scholars of the said school in teaching them virtue and learning, and whether the scholars of the said school do of their parts use themselves virtuous and studious, and whether they do observe and keep the orders and rules of my said free-school or not; and I will that the said master and wardens in their said visitation shall take order, if any of the rules or orders in my said school shall fortune to be broken, either by the master and usher or by any of the scholars of the same, that then the same may be forthwith reformed and amended according to their good discretions, and as my special trust and confidence is in them : and I will that the said master and wardens for the time being shall yearly have for their labours and pains 10*l*.† yearly; and also I will that the said master and wardens for the time being shall for ever weekly pay unto the six poor almsmen inhabiting in my alms-houses within the close of St. Ellen's aforesaid, for their relief, 4*s*. (that is to \*say), to every of them 8*d*. weekly; and I will the same to be paid every Sunday in the year, by the hands of the renter-warden of the said company of skinnners for the time being; And I will that the said renter-warden for his pains, to be taken in and about the payment thereof, shall have yearly, out of the rents and profits of the premises, 10*s*.; And further I will that the renter-warden of the said company of Skinners, shall bestow yearly, of the revenues and profits of the premises, 25*s*. 4*d*. upon coals, which coals so bought, I will, shall be yearly distributed and divided by the said renter-warden to and amongst the said six almsmen, for their farther relief and comfort; and I will the residue of all the rents, issues, and profits, yearly coming and growing of the said messuages, tenements, lands, gardens, and other premises bequeathed to the said master and wardens, shall be employed by the said

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† The original will could not be found; and it was stated that, in the book at Doctors' Common, the sum allowed to the masters and wardens was only 40*s*. instead of 10*l*.

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master and wardens for the time being upon needful reparations of the messuages or tenements aforesaid; and other overplus thereof remaining I will shall be to the use and behoof of the said company of Skinners, to order and dispose at their wills and pleasures."

The residue of his lands and tenements he gave to his second son in tail-male, remainder to his eldest son in tail-male, remainder to his own right heirs.

A statute, which Sir Andrew Judd published for the regulation of the school, and which was approved by the Archbishop of Canterbury and the Dean of St. Paul's in May, 1664, contained the following ordinance:—"I will that the master receive quarterly for the wages 5*l.* and the usher 40*s.*, to be delivered by the hands of the said Skinners or their deputy, and that they have their dwelling rent-free; and all other charges, as \*in repairing of the said school, in all manner of reparations, borne and allowed, necessarily and according to the view from time to time taken by the said wardens."

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In the 14th Eliz. an Act of Parliament was passed, intituled "An Act for the better and further assurance of certain lands and tenements to the maintenance of the grammar-school of Tonbridge in the county of Kent;" which, after reciting the foundation of the school and the grant of the letters-patent, stated, that, for the maintenance of a schoolmaster and usher, Sir Andrew Judd had purchased of John Gates and Thomas Thorogood certain lands and tenements situate in the parish of All Saints, in Gracious Street, and in the parish of St. Pancras, of the yearly value of 30*l.*; that, in the conveyance, Sir Andrew Judd, at the time of the purchase, being fully determined (as did very evidently and credibly appear) to have the premises conveyed to the master, wardens, and commonalty of the Skinners' Company, did of trust join with himself one H. Fisher, formerly his servant; that, in the 4th of Elizabeth, after the death of Sir Andrew Judd, H. Fisher, in performance of the trusts and confidence reposed in him, conveyed the said lands and tenements, with other lands of his own, of the yearly value of 6*l.*, to the Skinners' Company, for the sustentation as well of the said free-school as of one student in the University of Oxford; and that,

since his death, the title of the Skinners' Company had been impeached on the ground of a previous conveyance made by Fisher in fraud of his trust: And it then declared that previous conveyance to be void, and enacted, "that all lands, tenements, and hereditaments, with the appurtenances, secured or conveyed unto the aforesaid master, wardens, and commonalty of the Skinners in London as is aforesaid, shall from henceforth ever continue, remain, \*and be unto the said master, wardens, and commonalty of the mystery of skinners of London to the godly uses and intents above mentioned."

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In the 31st year of the reign of Queen Elizabeth, another Act was passed, intituled "An Act for the better assurance of lands and tenements in the maintenance of the free grammar-school at Tonbridge, in the county of Kent;" which, after reciting that Andrew Fisher, the heir of Henry, had endeavoured to impeach the aforesaid conveyance, letters-patent, and Act of Parliament, by pretence of the misnaming of the corporation, enacted, "that all the letters-patent, deeds, writings, assurances, and conveyances before mentioned, and the said Act of Parliament, shall be, of and for all such houses, lands, tenements, and hereditaments as were in anywise conveyed, meant, or intended to or for the said free grammar-school, good and effectual in law, to the governors of the possessions, revenues, and goods of the free grammar-school of Sir Andrew Judd; and that the governors of the possessions, revenues, and goods of the said free grammar-school shall have, hold, and enjoy for ever, all such houses, lands, tenements, and hereditaments whatsoever, with the appurtenances, as were assigned and conveyed, or meant or mentioned or intended to be assigned or conveyed, unto them by any of the letters-patent, writings, conveyances, or Act of Parliament before mentioned, to or for the said free grammar-school."

In those Acts there were clauses saving the rights of all persons and bodies politic, except Andrew Fisher and his heirs, and the heirs of Henry Fisher, and all persons claiming under Henry or Andrew.

The lands, which had been purchased from Gates and Thorogood, were part of the lands which the will purported \*to devise; and, with the other premises enumerated in the devise

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to the Skinners' Company, they now yielded a yearly rental of nearly 4,000*l*.

The question raised by the information was, Whether the Skinners' Company were bound to apply the whole profits of the premises to the charities mentioned in the will, or were entitled, after making the pecuniary payments specified by Sir A. Judd, to retain the surplus rents for their own use?

This question, so far as it regarded such of the devised lands as had not been purchased from Gates and Thorogood, depended entirely on the construction of the will. But the relators insisted, that, whatever might be the construction of the will, it was clear from the Acts of Parliament, and the instruments and transactions referred to in them, that the lands purchased from Gates and Thorogood were vested in the Skinners' Company on an express trust for the support and maintenance of the school. On the other hand, the Skinners' Company contended, that their title to these lands, as well as to the lands not purchased from Gates and Thorogood, must be considered as entirely derived from, and depending on, the will; and that, though at the time when the will was made, a devise of lands to a corporation was void, the gift was subsequently rendered good as an appointment to a charity by the retrospective operation of the 43 Eliz. c. 4.

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The VICE-CHANCELLOR,† by his decree made on the 10th of March, 1820, declared, that the messuages, lands, tenements, \*and hereditaments, purchased by Sir Andrew Judd of John Gates and Thomas Thorogood, and mentioned or comprised in the statute of the 14th of Elizabeth, intituled, &c., were then vested in the defendants in their special corporate character of governors of the possessions, revenues, and goods of the free grammar-school of Sir Andrew Judd, in the town of Tonbridge, in the county of Kent, not under the will of Sir Andrew Judd, but in consequence of the previous trust in that behalf reposed by Sir Andrew Judd in Henry Fisher, and by force of the two statutes

† The argument before the Vice-Chancellor, and his Honour's judgment, are reported in 5 Madd. 173, but the point there decided turned

upon special circumstances which deprive the decision of practical utility, and the report was consequently omitted.—O. A. S.

of Elizabeth, and to the uses and intents stated and expressed in the letters-patent of King Edward the VI., and to no other uses and intents." The Master was directed to inquire of what particulars these lands and tenements consisted; to take an account of the rents and profits of them received by the defendants since the filing of the information; and to approve of a scheme for the establishment of the school, having regard to the present annual rental of the said property: and it was further ordered, that he should inquire and state the particulars whereof all other the messuages, lands, tenements, and hereditaments, devised by the will of the late Sir Andrew Judd to the defendants, by the name of the master and wardens of the fraternity of Corpus Christi of the craft or mystery of Skinners of the City of London, consisted, and what were the present rents thereof; that he should take an account of the rents and profits of the last-mentioned lands received by the defendants since the filing of the information; and that he should inquire what was the annual expenditure of the defendants in respect of the six almsmen mentioned in the will of Sir Andrew Judd.

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The defendants appealed against the whole of the decree, except some of the inquiries directed by it; insisting \*by their petition of appeal that the decree altogether disregarded the trusts of the will of Sir Andrew Judd, which, they alleged, were rendered valid and effectual by the 43rd of Elizabeth.

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The LORD CHANCELLOR [after considering the question at length concluded his judgment by saying:]

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I am of opinion, that the evidence in this case is sufficient to shew, that the title to these estates in St. Pancras and Alhallows is not under the paper called a will, but \*under some transaction which must be taken to be antecedent to the will, and to have created an incapacity in Sir Andrew Judd to make, by that paper, the devise which it purports to make. In substance, therefore, the VICE-CHANCELLOR's decree is right. But I will infuse into it a word or two with respect to the paper called a will, so as to keep open the question, whether such a will, so bad as a will,

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may or may not be operative as a declaration of trust, by the effect of the statute of the 43rd of Elizabeth.

The decree of the LORD CHANCELLOR directed, that the declaration in the decree of the VICE-CHANCELLOR should be varied, and be as follows: "His Lordship doth declare, that it is sufficiently established and proved in this cause, that the messuages, lands, and tenements, mentioned or comprised in the said statutes of the 14th and 31st of Queen Elizabeth, in the information mentioned, which were purchased by Sir Andrew Judd of John Gates and Thomas Thorogood, were vested in the defendants, the master and wardens of the guild or fraternity of the body of Christ of the Skinners of London, in their special corporate characters of governors of the free grammar-school of Sir Andrew Judd, Knight, in the town of Tonbridge, in the county of Kent, not under the effect of the said instrument stated as the will of Sir Andrew Judd, but upon a trust previously and duly declared thereof by the said Sir Andrew Judd; by virtue and force of which trust the same messuages, lands, tenements, and hereditaments are to be considered as held by the said defendants, the Skinners' Company, in such corporate character, subject to such trust, and to and for the uses, intents, and purposes stated and expressed in the said letters-patent and statutes as aforesaid, and to and for no other uses, intents, and purposes." \*The decree of the VICE-CHANCELLOR was also varied in some of the subordinate directions which it contained.

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It appeared from the report of the Master, made in pursuance of the decree, that the present annual rental of the lands and tenements, which had been purchased of Gates and Thorogood, amounted to 3,190*l.*, and that the present annual value of the other lands and tenements mentioned in the will, amounted to 666*l.* 17*s.* 6*d.* The former, at the date of the will, yielded a yearly rental of 33*l.*; the latter (including the annuity of 10*l.*), a rental of 27*l.* 13*s.* 4*d.*; making together, at that time, a yearly income of 60*l.* 13*s.* 4*d.* The payments specified in the will amounted to 50*l.* 3*s.* 4*d.*, or, (if the sum allowed for the expenses of visitation was taken at 40*s.*, and not at 10*l.*), to 42*l.* 3*s.* 4*d.*

Originally, therefore, there remained a surplus of 10*l.* 10*s.* on the one supposition, and of 18*l.* 10*s.* on the other.

The Master stated that the annual expenditure of the Skinners' Company, in respect of the six almsmen mentioned in the will, amounted to 147*l.* 3*s.* 6*d.*

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At the hearing on further directions, the principal point discussed related to the construction of the clause,—“the residue of all the rents, issues, and profits yearly, coming and growing of the said messuages, tenements, lands, gardens, and other the premises bequeathed to the said master and wardens, shall be employed by the said master and wardens for the time being upon the needful reparations of the messuages or tenements aforesaid, and the overplus thereof remaining I will shall be to the use and behoof of the said company of Skinners, \*to order and dispose at their wills and pleasures.” The question was, whether the overplus of the rents of the devised lands, after making the payments and providing for the reparations mentioned in the will, belonged to the Skinners' Company beneficially, or was subject to a trust for the school or for other charitable uses?

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*Mr. Hart* and *Mr. Pemberton*, for the relators.

*Mr. Wray*, for the *Attorney-General*.

*Mr. Horne*, for the master of Tonbridge school.

The devise, they argued, is expressed to be for the maintenance and continuance of the school; and the testator has expressly directed, that the master and wardens, and their successors, shall apply the rents in the manner which he appoints. The specification of fixed payments directed by the will, exclusive of the 28*l.* to the master and usher, amounts to 22*l.* 3*s.* yearly; and the then rental of the property, which passed by the devise, was 27*l.* 13*s.* 4*d.*, leaving a surplus of 5*l.* 10*s.* 4*d.* This was to be a fund for the repairs of the buildings; and as that would be a fluctuating charge, there might be sometimes a small residue, the disposition of which he entrusts to the Skinners' Company.



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They are to order and dispose of it at their wills and pleasures ; that is, they are to order and dispose of it for the use of the school, or, at least, for the before-mentioned charitable purposes, of which the school was the principal ; but in the mode of applying it they are entrusted with a certain discretion, and are not, as in the payments previously mentioned, compelled to follow an unbending rule. There is nothing in any part of this will which points out the Skinners' Company as an object of the testator's bounty, beyond the amount of certain sums \*which he directs to be paid to them or to some of the members of their body ; and a construction, which should now give them 640*l.* a-year out of the rental of this property, while not a thirtieth part of that sum would go to the purposes enumerated by the testator, would completely disappoint his intention. Where the testator meant bounty to the Company, he has specified its amount. He has given to the master and wardens a certain sum for the expense of visiting the school, and has made an allowance to the renter-warden. If the Company were to take the whole overplus, the directions for these payments might have been omitted. The master and wardens must be considered as identified, in the mind of the testator, with the corporation.

*Mr. Heald, Mr. Sugden, Mr. Phillimore, and Mr. Gregg, contra :*

It is plain upon this will, that the testator contemplated that there would be a surplus, after providing for the particular charities which he has enumerated, and for the repairs of the tenements. If there had been no disposition of that surplus, the principle of the authorities, on which the whole of the increased rents of lands have, in some instances, been held to be devoted to charity, would not apply to this case ; for here the testator knew that the particular purposes, which he had enumerated, did not exhaust the whole of the then annual value of the lands. But it is not necessary to discuss that question ; for the concluding words are a distinct gift of the overplus to the Skinners' Company. The gift is not made to them as trustees ; on the contrary, the words are such as to exclude the idea of trust.

*The Attorney-General v. The Mayor of Bristol*,† and the authorities cited by the LORD CHANCELLOR in his judgment in that case, were referred to in the argument on both sides.

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THE LORD CHANCELLOR :

The former decree, I think, was extremely imperfect in not then declaring what was the construction of the will of Sir Andrew Judd. If the Court had at that period determined the question as to the construction of the will, it would have seen whether there was or was not any utility in sending it to the Master to take an account of the rents and profits of the estates not comprised in the purchase from Gates and Thorogood ; because, upon one construction of the will, the account of those rents and profits would be quite unnecessary.

As to the lands that pass under the will, two questions arise. The first is, whether, according to the true construction of the will, the corporation of Skinners are mere trustees, or have themselves an interest in the fund :—the second, whether, if they have an interest in the fund, an apportionment must be made of the increased rents between the quantum of that interest and the quantum of interest given by the will to other purposes, regard being had to the increase that has taken place in the produce of the whole.

I should mention, that some difficulties and embarrassments are created by the circumstance, that, first, by the VICE-CHANCELLOR, and afterwards by myself, the lands purchased from Gates and Thorogood have been \*separated, as to the effect of the charitable donation contained in the will, from the lands which were not included in that purchase, and are not affected by any other instrument than the will ; and a construction is now to be put upon a will, which was meant to embrace all the parcels of land that are mentioned in it, after it has been decided, that, with respect to a very large portion of those parcels of land, the will cannot be considered as the instrument disposing of them, but that they were disposed of by a prior declaration of trust. The will, therefore, is to be construed with respect to its effect upon the lands which the testator had power to devise ;

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and, in considering that construction, the will cannot be considered as having any effect upon the lands purchased from Gates and Thorogood, any further than as intention in the will, applying to the lands that pass by it, can be collected from the circumstance, that they are connected in the devise with other lands, which, the Court has determined, shall be applied wholly and entirely to certain charitable purposes.

[Here the LORD CHANCELLOR read over the will, remarking, as he read it, that it might have made a material difference, if this had been (what it was not) the case of a devise to one corporation for the benefit of a minor corporation, part of the same body; that the introductory words—"for the maintenance and continuance whereof I give, will, and bequeath to, &c.," were words, to which, in many cases, great weight had been given; and that the 10*l.*, given to the master and wardens for visiting the school, was to be paid to certain individual members of the corporation, and not to the corporation itself.]

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After the testator has given directions, continued the Lord CHANCELLOR, for various particular payments, there follows this clause, which, unless it can be made out to be a clause that operates upon nothing, creates a great difficulty—a clause which could not be applicable to what was purchased of Gates and Thorogood, but must be considered, with respect to its effect, as to those premises only which are claimed under the will:—"And I will the residue of all the rents, issues, and profits yearly coming and growing of the said messuages, tenements, lands, gardens, and other the premises bequeathed to the said master and wardens," (by which words I understand him to mean something different from what he means by the same expressions in the middle of the will, when he is giving the allowance for visiting the school, which allowance was certainly meant to be a present to them,) "shall be employed by the said master and wardens for the time being upon the needful reparation of the messuages and tenements aforesaid; and the overplus thereof remaining I will shall be to the use and behoof of the said company of Skinners, to order and dispose at their wills and pleasures." The question then is, whether—as it appears on the face of this will, that Sir Andrew Judd contemplated there

would be or might be an overplus, after the particular payments were discharged, and when he has given that surplus not only to the use and behoof of the company of Skinners, who would be trustees certainly under the former part of the will, as far as any interest vested in them, but has added these emphatic words, "to order and dispose of at their wills and pleasures,"—whether, I say, the company of Skinners can be called to account as mere trustees of the property which they were so to take and to dispose of at their wills and pleasures? Is this testator to be understood to have imposed on them an obligation, that they should dispose of the \*overplus, not according to their wills and pleasures, but in the charities which are thereinbefore mentioned? For, unless they can be called upon to dispose of it to the charities, thereinbefore mentioned, the information does not call upon the Court to direct them to dispose of it to other charities. Indeed, there would be, at least, as much difficulty in insisting, against these express words, that they were obliged to apply the overplus to other charities, or to charity generally, as in creating a trust for the school or the particular charities which are mentioned.

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Let me observe, there is a contest on this record whether the sums distributed among the master, the usher, the almsmen, &c., do or do not exhaust the whole of the yearly value as expressed in the will. It is evident, however, that the testator himself could not suppose that the trusts, which were particularly named, would exhaust the whole, because he afterwards provides for repairs. Then it was argued, that, looking at what repairs might probably be required, the whole might be considered as disposed of; but that is denied in the answer, which states, that there was a surplus beyond what the testator had given, and after the expences of repairs were defrayed.

[After referring to *Hynshaw v. The Corporation of Morpeth*, *The Thetford School* case, and *Arnold v. The Attorney-General*,† his Lordship said :]

There are several other cases on the subject; and, upon a consideration of them all, I adhere to the same view which I took of them in *The Attorney-General v. The Corporation of*

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† All which cases are stated in *Duke's Charitable Uses*, by Bridgman.

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*Bristol.*† In the first place, if a testator, by his will, gives the whole of the then value of the lands to charitable purposes therein expressed, denoting upon his will that he knows what is the whole value of the lands, giving the yearly value is equivalent to giving the rents and profits, and giving the rents and profits is equivalent to giving the lands themselves. The consequence must be, that the increase of the rents and profits will belong to those to whom he has given the yearly value, *alias* the rents and profits, *alias* the lands themselves. But none of the authorities apply in form to this case, in which the testator himself gives the residue of the rents and profits to the body whom he has made trustees. And the first question arises upon the residuary words in the devise, paring down, as far as you are authorized \*so to do, their effect, by looking at what the testator has said concerning the yearly value of the property, and at his purpose, as expressed in the introductory words of the will. Does or does not that concluding part of his will take this case out of the effect and operation of the decisions with respect to charitable bequests, to which I have referred?

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Now I cannot say that the introductory words are to destroy the effect of the concluding words; and I see no reason, why the testator may not be considered as declaring to this effect:—“The manner, in which I mean to provide for the maintenance, establishment, and continuance of this school is, to give the property to the Skinners’ Company.” It is not merely matter of general argument, that a body may be very unwilling to undertake such a trust as this, if they are to get nothing by it; for it appears, in this very case, that they refused a bequest by Sir ——— Smith, because they would not gain any thing by it. Did not the testator, then, on the whole, mean—“for the purpose of continuing and establishing my school,” (which, by the way, was not his only purpose, because he provides for almshouses, &c., purposes, which do not appear in the will to be connected with the school,) “I give these lands, that the master may have 20*l.*, and the usher 8*l.*; that there may be so much paid to the master and wardens of the company for going down to visit the school; that so much be paid, not to my school, but

† 22 R. R. 136 (2 J. & W. 317).

to my almshouses, and then that all the premises be kept in repair ; whatever overplus there may happen to be, I give it to the corporation of Skinners ; I not only give it to the corporation of Skinners, but I give it to them to dispose of at their own wills and pleasures." In truth, the question is, Whether I am authorized by any of the decisions to say, that their will \*and pleasure is a will and pleasure which is to be controlled by the effect of the other parts of the will ?

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Now here I cannot bring myself to think, that I have any authority to strike out of this will the words " to dispose of at their wills and pleasures ; " and I am therefore of opinion that, as far as any residue is constituted, the Skinners' Company are not, in the large sense, trustees of that residue.

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There is another point, which was not much argued at the Bar. I mean, whether there is to be a proportionate augmentation of the sums devoted to charitable purposes ; an augmentation regulated by the proportion of the former value of the residuary interest, and the respective values of the sums given to the charitable objects mentioned in the will. In considering that question, the points to be looked at are,—what are the cases in which such proportionate distribution has been made ? Are there any cases in which that proportionate distribution has been made, unless all the purposes, to which the rents and profits of the premises are devoted, are charitable purposes ? Are there any cases, in which, if the residue is given not to charitable purposes, there has been such a proportionate distribution ?

The two following points were argued, on the one side by *Mr. Hart*, and on the other by *Mr. Heald* :

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First, whether the payments to the different charities mentioned in the will ought to be increased, so that those payments, and the overplus which was to go to the Skinners' Company, might bear the same proportion to one another, and to the whole yearly value of the devised lands, as they respectively bore to one another at the date of the will.

Secondly, in consequence of the great increase in the rental of the lands which were exclusively appropriated to the school, the

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scheme for the establishment of the school, which the Master had approved of and the Court had confirmed, was on a very large and extended scale, and embraced, among other things, the erection of very extensive buildings. Hence it became a question of importance, whether the lands which passed under the devise ought to contribute their proportion, according to their relative value, to all the repairs of the premises erected or to be erected, according to this enlarged scale, for the purposes of the school?

*Mr. Heald* contended, that those repairs ought to be borne exclusively by the lands appropriated to the use of the school; or, at any rate, that the devised lands ought not to contribute more towards repairs, than if the school-house had remained of the same size as it was at the time of the founder's death.

THE LORD CHANCELLOR :

The object of the information was to have the trusts of a property, which, in point of legal interest, was vested in the Skinners' Company, declared and executed; and the question was, On what trusts and for whose benefit was it so vested? The title to the property was derived either altogether under the will of Sir Andrew Judd, or partly under that will and partly under other instruments. But, in whichever way the title was derived, I am afraid that the VICE-CHANCELLOR and I did not take the best course in sending it to the Master to frame a scheme for the future administration of the charity, when nothing more had been determined than that a portion of the property had not passed by \*the will, and that the charitable uses, which affected that portion, were created by other instruments. It would have been fortunate, had it occurred to either of us, that it would have been much more convenient to have determined at the same time what the rights of the parties were in the property which passed under the will, than to postpone that question till after the master had settled a scheme with reference to the property which did not pass under the will. The fitness of this or that plan for applying the rents of the property, which did not pass by the will, might depend very much on the result of the question, whether the surplus rents

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of the lands that passed by the will were to go to the Skinners' Company or to charitable uses?

I have stated my opinion to be, that, as to the estates which passed under the will, there was a final gift of the surplus rents and profits, however or out of whatever that surplus might be constituted, for the benefit of the Skinners' Company. That opinion, I admit, cannot be maintained, unless I am also right in saying, that, if all the premises mentioned in the will had passed by virtue of the devise, the surplus of the rents of all those premises (much larger as the surplus in that case would have been) must have belonged to the Skinners' Company; and I should have had no authority to have directed such an augmentation of the charity, as has been made, under the decree of the Court, out of the rents of the estates which were purchased from Gates and Thorogood.

In coming to this conclusion I did not proceed upon the authority of *The Attorney-General v. The Corporation of Bristol*; for, though that case involved, in some measure, the principle, and imposed on me the duty of considering very much that class of cases, in \*which the increased rents of lands given to charitable uses have been held to be wholly applicable to charity, there were in it a great many circumstances which distinguish it from every other, and prevent me from regarding it as a precedent for the decision of any of the questions which arise here. The grounds, on which I formed my opinion as to the question, whether the will left in the Skinners' Company an interest for their own benefit in the estates which passed by the will, were of this nature. Nobody can doubt, that, in matters of charity, this Court has taken very great liberties with the wills of testators; but, to the extent to which the Court has gone in decisions frequently repeated, a Judge, who is now to decide, must follow in the same track, recollecting that he owes a great deference to the opinions of those who have gone before him. Now, in the first place, there are many cases which have decided, that, where it appears on the will itself, what was the yearly value of the estates given to charitable purposes, and the testator has parcelled among the different charities the whole of that yearly rent or value so attributed to the property, any future increase of rents

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must go to charity. The Court seems to have said, that the testator has himself declared what constitutes the whole of the estate, and that, in parcelling out his dispositions to charity, he has exhausted in charity what, he himself has said, constitutes the whole of the estate; and, from the circumstance of his knowing what was the then present value of the estate, and devoting it exclusively to charity, we have inferred an intention on his part, that the whole of the estate should be given to charitable purposes. The doctrine of these cases is neither more nor less than this:—a gift of the rents and profits of an estate is a gift of the estate itself; such a devise, as I have just mentioned, is the gift of the rents and profits; it is therefore a gift of the estate.

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The Court has gone further. It has said, that, though the testator has not pointed out what was the yearly value of the lands, yet, if he has otherwise sufficiently manifested his intention to give the whole of the estate to charitable purposes, the increased rents must be applied to the charitable uses which he has mentioned. One of the strongest of all the cases is that in which a testator,† beginning his will, as the testator begins it here, by an expression of a purpose to give certain lands to charitable uses, devised an estate worth 240*l.* a year, without marking its value, to trustees and their heirs, whom he directed to make payments, amounting in the whole to 120*l.* a year to different charities. The question arose, whether the surplus rents were to go to the charity. The Court there said,—“here is a declaration that the testator meant these devises for charitable purposes; and, though in form he has given only 120*l.* a year to charity, yet he has given nothing more out of this land to any person, and he has given a pecuniary legacy to his heir at law:” and these two circumstances, in connection with the prefatory words, were held sufficient *indicia*, that he meant to give the whole to charity. In that case there was a circumstance which does not occur here,—the legacy to the heir at law; (perhaps the observation is not quite correct, for here the heir does take something by descent.‡ There was, also, the absence

† *Arnold v. The Attorney-General*,  
Bridgman's edition of Duke, 591.

‡ The will likewise purported to  
devise lands to the heir.

of a circumstance which does occur here; for this testator expressly gives the surplus to the Skinners' Company; and he goes on to declare that he gives it to them for their own benefit, and to dispose of at their own will and pleasure. The Court has inferred, from very slight circumstances, that a testator did mean to give the whole of an estate to charitable uses; but I \*can find no case in which the Court has said, that, if it appears on the face of a will that the testator knew that the value of his estate was or might be more than the amount of what he had given in parcelling out the disposition of sums to charity, it was authorized to hold that such particular disponees should take the whole, though an intention to give them the whole did not appear on the face of the will. Still less is there any authority for saying, that, in such a will as this, a general disposition, such as is contained here, would not dispose of the whole surplus to the final devisee.

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Supposing my opinion upon the application of the surplus to be right, another question remains as to the constitution of that surplus. The question is this—Is the surplus, which, properly constituted, is to belong to the Skinners' Company for their own benefit, a surplus which is to be constituted by making only the specific payments mentioned in the prior part of the will and no other? or have the objects of the testator's bounty, who are mentioned in the prior part of the will, a right to say, that, looking at what was the value of the surplus rents after making the specified payments, at the time of the testator's death, there shall be an apportionment of the whole rents between them and the company, so that the present rents shall be divided between the different charities and the Skinners' Company, in the same proportion in which the rents of the estate at the testator's death were then payable? My opinion is, that there cannot be such an apportionment.

Another question is, whether the property, which passes by the will, can be applied towards any of the purposes, to which the property conveyed by Gates and Thorogood has been devoted by the scheme; or, whether it is to be applied to such purposes only as the whole \*must have been applied to, if the whole had passed by the will? Though a will, which has not been duly executed

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so as to pass real estate, cannot be read for the purpose of shewing what the intention of the testator was, yet, if a testator takes upon himself, by a will duly attested, to devise lands which were not his, the whole of that will may be read for the purpose of shewing his intention. If we had the whole property to dispose of as passing under the will, it is clear that we should have to consider only the objects to which it was, by the will, made applicable. It happens, that, as to a great part of the property mentioned in the will, the disposition of the rents is not to be regulated by the will, but by prior instruments, forming a title paramount to the will: and, with reference to those instruments, the Court has done what it could not have done, if the whole had been to be considered as passing by the will. The disposition, which has been thus made, of the rents of that part of the lands which does not pass by the will—a disposition made under or with reference to those prior instruments—cannot be the rule for settling the disposition of the rents of those estates which do pass by the will.

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The will speaks of a school-house, and almshouse, and mentions various messuages and tenements, and it then directs that “the residue of all the rents, issues, and profits, yearly coming and growing of the said messuages, tenements, lands, gardens, and other the premises bequeathed to the said master and wardens, shall be employed by the said master and wardens for the time being upon the needful reparations of the messuages or tenements aforesaid;” and the overplus is given to the Skinners’ Company. Now, according to the plan which has been approved of by this Court, the school-house, and the buildings connected with it, go far beyond any \*school which could have been within the intent of the testator, and must, from time to time, require reparations to an extent which he could not have contemplated. Thus arises a question, whether the rents of the lands, which pass by the will, can be applied to any purposes of reparation, other than the reparation of the messuages and tenements mentioned in the will?

This testator did not look to the increase of the buildings of the school, or to such an increase of the charitable purposes as has actually taken place independently of the will. The authority

to cause enlarged buildings to be erected was derived, not from the will, but from other instruments; and the reparations meant by the will could not be reparations of things not mentioned in nor sanctioned by the will. Where a testator has directed a school-house, which he has erected, to be repaired, and certain almshouses and other tenements mentioned in his will to be also repaired, out of the residue of the rents and profits, can there be any ground for saying, that the overplus, which shall remain after such reparations are made, and which he has given to the Skinners' Company, shall be diminished by the application of part of the rents to the reparation of buildings made in addition to the charity, which could not have been erected under the authority given by the will? I think not. The consequence is, that, if the school-house does not remain such as it was in the time of Sir Andrew Judd, the surplus rents of the devised lands cannot be charged with contributing a larger sum towards its repairs, than would have been thence contributed, if the school-house had remained in its ancient state. That surplus must repair the school-house to the same extent as if no increase in the charity had taken place, but not to a greater extent.

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In the new scheme, which had been approved of by the Master, and sanctioned by the Court, 200*l.* a year was to be allowed to the Skinners' Company for the expenses of the annual visitation of the school by the master and wardens.

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The last question was, whether this 200*l.* should come entirely out of the rents of the lands purchased of Gates and Thorogood, or whether the devised lands should contribute towards it in any and what proportion? And if they were to contribute, then, whether the devised estates ought to contribute their proportion of the enlarged allowance of 200*l.* a year, or only a proportion of the 10*l.* devoted by the testator to the specific purpose of the expenses of visitation, leaving the residue of the 200*l.* to be paid out of the rents of the estates purchased of Gates and Thorogood?

The cause was argued on this point by *Mr. Heald* on the one side, and *Mr. Hart* on the other.

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The LORD CHANCELLOR expressed his opinion, that only so much of the 200*l.* should be paid out of the rents of the estates purchased of Gates and Thorogood, as would bear to the residue of 200*l.* the same proportion which the yearly value of those estates bore to the yearly value of the devised estates.

He was further of opinion that the costs of the suit ought to be borne by the two classes of estates in the same proportion; except only the costs and expenses of the scheme for the establishment of the school and of the proceedings relative to that part of the case, which, he thought, ought to be defrayed wholly out of the hereditaments purchased of Gates and Thorogood.

1826,  
Aug. 15.

Lord  
ELDON, L.C.  
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# IN RE FRANK.

(2 Russ. 450—451.)

Even the eldest son and heir-at-law of a lunatic will not be appointed one of the committees of his estate, without giving security, unless the Master reports that no person can be found to act as committee, who will give security.

ON the 19th of June an order was made, that the care and management of the estate of the lunatic should be granted to J. B. Frank, his eldest son and heir-at-law, Sir W. B. Cooke, Bart., and Mr. Wrightson, they giving security in the usual manner, which security was to be perfected on or before the 19th of August.

Sir W. B. Cooke was ready to perfect his securities, but Mr. Wrightson and J. B. Frank had not perfected, and were not likely to perfect, their securities.

The heir-at-law, J. B. Frank, now presented a petition, praying that it might be referred back to the Master to certify who was or were the most proper person or persons to be committee or committees of the estate of the lunatic jointly with the petitioner, without giving security; and that it might be referred to the Master to appoint a receiver of the rents, such receiver giving the usual security.

The estates were of very considerable annual value.

*Mr. Pepys and Mr. Knight*, in support of the petition :

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The former appointment of the 19th of June being joint, and two of the persons appointed having failed to perfect their securities, the nomination becomes entirely inoperative. It is of the greatest importance to the family of the lunatic, that the eldest son should be one of the committees of the estate; but, if security is required \*of him, he will be excluded in effect. As Sir W. B. Cooke is ready to perfect his securities, there can be no substantial ground for requiring security from the son and heir-at-law of the lunatic; and, at all events, by appointing a receiver, to whom the whole of the rents may be paid, the necessity of requiring security will be altogether removed.

[ \*451 ]

*Mr. Heald*, *contra*, insisted, that no person ought to be appointed committee without giving security—that the near relationship of the petitioner to the lunatic afforded no reason for departing from the usual rule—and that the expense of a receiver was not to be incurred, in order that a person who could not give security, might be appointed committee.

THE LORD CHANCELLOR :

I see no reason for the appointment of a committee without security. I cannot appoint a committee without security, unless the Master reports that no person will act as committee, who will give security. I can only refer it back to the Master to appoint committees of the lunatic's estate.

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### DAWSON v. RAYNES.†

(2 Russ. 466—472.)

1826.  
Aug. 25.

Lord  
ELDON, L.C.  
[ 466 ]

A receiver, who had omitted to account regularly, became bankrupt, being indebted to the trust-estate in a large sum; and, for some time, no steps were taken to have his accounts duly passed: Held, that, under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay interest.

By an order of the 22nd of March, it was referred to the Master to approve of a proper person to be receiver of the

† *In re Graham*, *Graham v. Noakes*, '95, 1 Ch. 68, 69, 70.

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monies, securities for money, bonds, and mortgages in the pleadings mentioned, and to get in the outstanding personal estate of the plaintiff, John Dawson the elder. The order contained the usual directions, that the person to be appointed receiver should pass his accounts annually, and pay into the bank the balances reported due from him, and that he should in like manner pay into the bank what he should receive on account of such monies and securities, bonds and mortgages.

The Master by his report, dated the 13th of June, 1817, certified, that he had appointed John Gooden receiver, and that he, together with Joseph Wheatley and Samuel Slater, as his sureties, had entered into a recognizance, enrolled in the proper office, by which they stood severally bound in 5,000*l.*, with a condition to be void, if Gooden should duly and annually account for and pay what he should receive in respect of the said monies and securities for money, bonds and mortgages, as the court had directed or should direct.

On the 22nd of June, 1818, a commission of bankrupt issued against Gooden and a person with whom he was in partnership, under which they were declared bankrupts. Gooden did not appear to have received any of the trust property after his bankruptcy.

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On the 16th of June, 1821, he carried in his first account before the Master; and in June, 1822, an order was made, directing the Master to allow to the receiver certain sums which he had paid to the plaintiffs, and giving the sureties liberty to attend the passing of his accounts.

The accounts of Gooden having been finally passed, the Master, by his report dated the 28th of May, 1823, certified, that Gooden had received 4,367*l.* 4*s.* 8*d.* on account of the trust property; that, in pursuance of the general order of the 23rd of April, 1796,† he, the Master, had added to that sum 687*l.* 4*s.*, for interest at 5 per cent. on the balance of the receiver's account,

† This order directs that, with respect to such receivers as shall neglect to deliver in their accounts, and pay the balances thereof, at the times to be fixed for that purpose, the several Masters, to whom such

receivers are accountable, shall, from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries therein claimed by such receivers, but also charge interest

and, though the sureties had objected to the allowance of interest, he did not think himself at liberty to depart from the general order in their favour; that, in conformity to the \*direction contained in the same order, he had not made the receiver any allowance for salary; that the receiver had properly disbursed sums amounting in the whole to 1,097*l.* 12*s.* 6*d.*; and, therefore, that the balance remaining due from him, including interest, was 3,956*l.* 16*s.*

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[ \*468 ]

Upon this the sureties presented a petition, praying that they might be at liberty to pay into Court 3,269*l.* 12*s.*, being the amount of the balance reported due, exclusive of the interest, and that, so far as regarded them, the recognizances might be vacated.

The petition was heard before the Vice-Chancellor in November, 1823; and the order, which he made upon it, was, that a case should be stated for the opinion of the Court of King's Bench on the following question, Whether Joseph Wheatley and Samuel Slater, as sureties in the recognizance, were bound in law to pay interest on the balance reported due from the receiver, or any part thereof?

The Judges returned the following Certificate:—"We are of opinion, that, if there has been any breach of the condition of this recognizance, the penalty is the debt at law; and the question of interest does not arise at law."

The plaintiffs then petitioned, that the sureties might be ordered to pay into Court the whole of the balance reported due, and also subsequent interest to be computed from the 14th of June, 1823, the day which the Master had fixed for payment of the money, and at which his computation of interest had stopped.

The question was argued before the Vice-Chancellor; and his Honour, on the 5th of March, 1824, ordered, that the sureties should within three weeks pay into \*Court the sum of 3,269*l.* 12*s.* 6*d.*, being the principal sum only reported due, and that thereupon their recognizance should be vacated.

[ \*469 ]

at 5*l.* per cent. per ann. upon the balances so neglected to be paid by them during the time the same shall appear to have remained in the hands of such receivers.



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v.  
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Against this order the plaintiffs appealed. They insisted, by their petition, that they were entitled, under the general order of the 23rd of April, 1796, to the 687*l.* 4*s.* which the Master had reported due for interest, and also to subsequent interest to the time when the balance should be actually paid; and that, by their recognizance, the sureties became bound to pay any sum, which, under the general order, the receiver would be liable to pay.

*Mr. Flather*,† for the plaintiffs :

The plaintiffs do not apply for the aid of a court of equity. At law the penalty of the recognizance is forfeited; and the sureties come here to have their recognizance vacated, without paying the full amount of the penalty. A court of equity will not grant them that relief, until they have paid all the principal, interest, and costs which the principal debtor might be called upon to pay : *Greenside v. Benson*.‡

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*Mr. Sugden*, for the sureties of the receiver :

\* \* The penalty of the recognizance can stand as a security only for the debt actually due. That debt is the balance of the principal monies; and, upon payment of the balance, the sureties ought to be relieved from their recognizance.

Even if the general rule were otherwise, it ought not to be applied in a case like this. Why did not the parties take proceedings, the moment the receiver was in default? Why, at least, did they not take proceedings, the moment the commission of bankrupt issued? Are they to permit year after year to run on, and then to come upon the sureties for an enormous accumulation of interest? If the parties to the suit had not been

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\*negligent, the sureties might have obtained under the commission some degree of indemnity, which is now lost to them for ever.

† The argument was prior to the commencement of these reports, and was not heard by the reporter. He states the purport of it from a com-

munication which *Mr. Flather* had the kindness to make to him.

‡ 3 Atk. 248.

## THE LORD CHANCELLOR :

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The question is, Whether the sureties of the receiver are to be charged only with the balance of the trust-monies which came into his hands, or whether they are further to be charged with that interest which he would unquestionably be liable to pay, if he were able? The question is one of great importance with reference to all cases in which sureties may be called on to answer for the principal money and interest, which the principal debtor would have to pay, if he possessed means of payment.

The VICE-CHANCELLOR was of opinion that the sureties could not be compelled to pay any interest. If the sureties are not liable, within the meaning and intent of the recognizance in its present form, to pay the interest which the receiver himself would be bound to pay, the consequence will be, that the form of the recognizance must be improved and must be rendered more comprehensive. It seems to me that it would be difficult to say, that, where the principal debtor would be obliged to pay interest, there would not be an equity that the surety should pay the interest in default of the principal. The penalty is forfeited by the breach of the condition ; the amount of the penalty is the debt due from the sureties at law. How can they have a right to be discharged in this Court from their legal liability, till they have paid all that the principal could have been required to pay ?

In this case, however, there are very particular circumstances. The receiver had been bankrupt, with the \*knowledge of all parties, for a considerable length of time ; and no steps were taken to compel the passing of his accounts. I am, therefore, not inclined to make the sureties pay interest ; but I shall insert some words into the order, to shew, that, in affirming it, I act upon the particular circumstances of the case, and to prevent it from being hereafter supposed that this is a judgment, that the sureties of a receiver are not answerable for interest which the receiver himself would have been liable to pay. [ \*472 ]

It does not appear, from the entry in the Registrar's book, that any alteration was made in the phraseology of the VICE-CHANCELLOR's order. According to the entry, the order of the

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LORD CHANCELLOR is dated the 13th of February, 1827, and is as follows:—

“His Lordship doth order, that the order, dated the 5th of March, 1824, be affirmed, and that the sum of 5*l.*, deposited with the Registrar on setting down the appeal, be paid to Joseph Wheatley and Samuel Slater.”—Reg. Lib. 1826, A. 480.

THE ATTORNEY-GENERAL *v.* THE EARL OF  
MANSFIELD AND OTHERS.

(2 Russ. 501—538.)

Where a school, upon the true construction of the instruments establishing it, ought to be a grammar-school for instruction in the classics, the trustees will not be permitted to convert it into a school for teaching merely English, writing, and arithmetic, though it had ceased, from before the time of living memory, to be a place for classical education, and though it appeared from old regulations, that elementary instruction in English had always been one of the objects of the institution.

Where the original statutes of such a school show that the intention of the founder was, that the master should be employed personally in teaching the children, he must not leave the detailed management of the school to an usher; nor is it any excuse for his doing so, that, as minister of a chapel annexed to the school, he devotes his time to ecclesiastical duties.

A chapel had been granted to the trustees of the school for the maintenance of the school, and the inhabitants of the hamlet had been long accustomed to attend the performance of divine service there;—it was held, with reference to the details of its history, and the particular language of the instruments, that the chapel was not in the nature of a chapel of ease for the accommodation of the hamlet, but belonged to the school, and that the trustees of the school had no right to apply the revenues of the charity in enlarging the chapel for the accommodation of the inhabitants of the hamlet.

Trustees of a charity cannot be allowed the costs of an unsuccessful attempt to obtain an Act of Parliament to enable them to administer the property of the charity on an improved plan, though their failure arose from accidental circumstances, and though their motives were fair and proper.

The trustees of a charity were made, as individuals, defendants to a suit for the administration of the charity; afterwards the information was amended, and they were made defendants in their corporate capacity, but the suit was not dismissed against them as individuals: at the hearing, the record was considered as constituting two different causes; and the cause against the trustees as individuals was dismissed with costs, though, in the cause against them in their corporate capacity, a decree was made, remedying abuses which had grown up in the charity, and regulating its future administration.

By letters patent, dated the 6th of April, in the seventh year of Queen Elizabeth, reciting that Roger Cholmeley, Knight, had petitioned that in the town or hamlet of Highgate a grammar-school, for the good education and instruction of the boys and young men in that place and the neighbourhood adjoining, might be erected, founded, and established, and also that he might be

1823.  
*Dec.* 16, 17.  
1824.  
*Jan.* 16, 17.  
1826.  
*Nov.* 13.  
1827.  
*Jan.*  
*Mar.*  
*April* 4, 7, 28.  
—  
Lord  
ELDON, L.C.  
[ 501 ]

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 [ \*E02 ]

enabled in any other convenient manner to provide for the relief and support of certain poor in the said town or hamlet,—her Majesty ordained, that, for \*the future, there should be one grammar-school in Highgate, which should be called “The Free Grammar-School of Roger Cholmeley, Knight,” for the perpetual education, bringing up, and instruction of boys and young men in the knowledge of grammar. Six persons were constituted a body corporate, by the name of “The wardens and governors of the possessions, revenues, and goods of the free grammar-school of Sir Roger Cholmeley in Highgate;” and they and their successors were empowered to take and hold lands for the support and maintenance of the school, and the relief of the poor of Highgate.

There was to be one master of the school, who was to be appointed by Sir Roger Cholmeley while he lived, and, afterwards, by the governors. To the founder during his life, and, after his death, to the governors (subject, however, in the latter case, to the consent of the Bishop of London), was given the power of making laws “concerning the ordination, government, and direction of the schoolmasters and scholars of the aforesaid school, the stipend of the schoolmaster, and other things touching the same school.”

By a deed, dated the 27th of April, in the same year, (1565,) reciting that the Bishop of London, as lord of the manor of Haringaye, was proprietor of the chapel or sacellum of Highgate, parcel of the said manor, and that Roger Cholmeley intended to erect and found a free grammar-school in Highgate, and to endow it with divers lands and hereditaments, the Bishop confirmed unto Sir Roger Cholmeley the chapel or sacellum commonly called Highgate chapel, and the site surrounding it, together with certain adjoining lands, to the intent that Sir Roger Cholmeley should, within a year, assure, as well the chapel and premises as other hereditaments of \*the clear annual value of 10*l.* 13*s.* 4*d.*, to the wardens and governors of the school, and their successors, for the benefit of the free school and its better maintenance. On the 6th of May following, the Dean and Chapter of St. Paul's, London, executed a deed confirming the Bishop's grant.

[ \*503 ]

By another indenture, bearing date the 7th of June, 1765, reciting the letters-patent and the deeds of grant and confirmation from the Bishop and the Dean and Chapter, Sir Roger Cholmeley, in pursuance of the true intent of the charter made to him by the Bishop, conveyed unto the wardens and governors, and their successors, the chapel or sacellum of Highgate, with the other premises described in the Bishop's grant, and certain tenements in the city of London, of the clear yearly value of 10*l.* 13*s.* 4*d.*, "for the better sustentation and maintenance of the free grammar-school, and not otherwise, nor to any other uses."

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Sir Roger Cholmeley died on the 21st of June, 1565, without having made any ordinances for the government of the school. On the 14th of December, 1571, the wardens and governors gave the school a set of statutes, which were signed by the Bishop of London. The first two of those statutes were as follows: "First, we order and decree, according to the will, mind, and intent of the said Sir Roger Cholmeley, Knight, founder of this free school, that there be an honest and learned schoolmaster appointed and placed to teach the scholars coming to this free school, which schoolmaster, that shall be placed, be graduate, of good, sober, and honest conversation, and no light person, who shall teach and instruct young children, as well in their A, B, C, and other English books, and to write, and also in their grammar, as they shall grow ripe thereto, and that, without taking any money or other reward for the same, \*other than is hereafter expressed and declared. Secondly, we will and order that any schoolmaster, that shall be placed to teach in the free grammar-school, shall say and read openly, at the chapel at Highgate next adjoining to the said free grammar-school, the service now allowed and set forth by the Queen's Majesty, and that decently and orderly, according to her Majesty's injunctions, in the form following; that is to say, every Sunday and holiday, morning and evening prayers; every Wednesday and Friday, morning prayers, with the Litany; and on Saturday and the vigils of every festival day and holiday in the year, evening prayers: the same service to be read at hours meet and convenient, saving that, on any the first Sunday of every month in the year, the said schoolmaster shall not say the morning prayer in the said

[ \*504 ]

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chapel, because the inhabitants of the said town or hamlet of Highgate are by the ordinaries of that place appointed every such Sunday to resort to their several parish churches to hear common prayer and sermons, and to receive the holy communion there; and that the same schoolmaster shall not have or take any cure elsewhere, neither read any service publicly but in the said chapel at Highgate, being only a chapel of ease for the inhabitants of the said town of Highgate, and for that purpose erected by the founder, that the schoolmaster for the time being should not only teach and instruct children in learning and good letters, but also should say service in the said chapel in the manner afore specified." Others of the statutes fixed the number of the scholars at forty, and directed that the master should pray with the scholars every morning at seven o'clock; that, "after prayers, he should remain in the school, diligently teaching, reading, and interpreting, or writing, till eleven o'clock in the forenoon, and not to depart but upon very urgent and great causes; that, by one of the clock, after dinner, he should resort to the school again, there to remain \*with the scholars teaching them as aforesaid; and that he should not absent himself from the school above ten days in the year, nor so long, but upon urgent and good cause."

[ \*505 ]

\* \* \* \* \*

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The information charged, that the wardens and governors of the school, thus established and endowed by Sir Roger Cholmeley, had permitted it to be converted, from a free grammar-school, into a mere charity school, in which the children of the poor were taught to read English, and to write, upon the plan adopted in the national schools; that the master, though he received a salary of 250*l.*, did not devote his time to the business of the school, but employed for that purpose an illiterate person as usher; that, instead of considering the school as the primary object of the charitable fund, to which the performance of divine service in the chapel was to be auxiliary and secondary, the wardens and governors had treated the support of the chapel and the performance of divine service in it, for the general use of the inhabitants of Highgate, as the principal object of the \*charity; that, while they applied only small sums for the benefit of the school, they had expended the greater portion of the revenues of the property

[ \*507 ]

in repairing and enlarging the chapel and the adjacent burial-ground; and that the chapel was, in fact, treated as a mere parochial place of public worship, unconnected with the school, while the master devoted his time not to the business of the school, but to the discharge of the duties of pastor of the hamlet and clergyman of the chapel. There were, also, various other charges of misconduct against the wardens and governors. The prayer was, that the trusts of the charity might be declared and carried into execution; that certain accounts might be taken; and that the wardens and governors might be removed.

The answer of the wardens and governors stated, \* \* that the object of Bishop Grindal, in making the grant, \*was to secure to the inhabitants of the hamlet the advantages of a place of public worship, by insuring a constant and regular succession of ministers to read prayers, and officiate in the chapel, as well as to forward and assist the views of Sir Roger Cholmeley in regard to the school, the person, who was schoolmaster, being also to officiate as minister of the chapel; that the school and chapel formed, and still form, one foundation,—the school being for the education and instruction of the children of the town or hamlet of Highgate, and its vicinity; and the chapel, for the ease and accommodation of the inhabitants in the celebration of public worship; that it was the intention of Sir Roger Cholmeley and Edmund Grindall, Bishop of London, that the chapel should be upheld as a chapel of ease for the use and benefit of the inhabitants of the hamlet; that the Bishop, by making a grant of the chapel, with the adjacent property intended to secure, and did, in the event, secure, a succession of persons qualified to perform service at the chapel, as a chapel of ease; that Sir Roger Cholmeley, on the other hand, obtained, by the grant from the Bishop, not only the ground upon which the school-house then stood, but also a residence for the master of the school, together with an orchard, garden, and two acres of land, subject, however, to the burden, annexed as a condition to the grant, of supporting the chapel as a chapel of ease, whereby there was imposed upon Sir Roger Cholmeley, and afterwards upon the wardens and governors of the charity for the time being, the obligation to find and supply, out of the revenues of the foundation, a reader or

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ATT.-GEN. minister for the chapel; that Sir Roger Cholmeley took the  
 EARL OF chapel as a burden, and not as a benefit; that no profit or  
 MANSFIELD. revenue arose at that time from the chapel as distinguished from  
 the other property contained in the Bishop's grant; that it was  
 not contemplated by Sir Roger Cholmeley, or the Bishop, that  
 [ \*509 ] \*the chapel would ever become a source of profit or revenue for  
 the school; that there was no direction in the statutes and ordin-  
 ances that the scholars of the school should attend the chapel,  
 when public prayers were to be read there; nor was there any  
 evidence to shew that the wardens and governors ever required  
 that the scholars should so attend, until the year 1676.

\* \* \* \* \*

So far back as living memory could reach, the school had been  
 merely a place for instruction in English, writing, and arithmetic.  
 It could be shewn, that, from 1649, the business of the school  
 had been conducted by an usher; and the usher had generally  
 been a person who followed, more or less, some other occupation  
 [ \*510 ] incompatible with the notion of his habits and \*attainments  
 being adequate to the task of communicating classical instruction.  
 The names of some dictionaries and of several Greek and Latin  
 authors appeared in a catalogue of books which formerly belonged  
 to the school; but, after 1711, there was no trace of the existence  
 of such a library as connected with the establishment. Even so  
 far back as 1677, it was stated in the instrument appointing a  
 master, that he was elected to teach and instruct the free  
 scholars in reading of English and writing, and in their grammar,  
 and duly reading of the Common Prayer in the chapel every  
 Sunday morning and evening, according to the rules.

The wardens and governors further stated, that the present  
 master, who was also minister of the chapel, frequently visited  
 the school, examined the boys, and superintended the system of  
 education which had been adopted; and that this system was  
 far more beneficial to the neighbourhood than a classical school.  
 They added, that the present master, since his appointment, had  
 been in the habit of explaining the Catechism and attending to  
 the religious instruction of the children; that he had performed  
 several duties, not imposed upon him by the ordinances or  
 statutes, most highly beneficial to the inhabitants of the hamlet,

such as reading prayers at the chapel, on the morning of every fourth Sunday in the month, preaching therein fifty-two sermons in the year, and administering the sacrament fourteen times in the year.

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They submitted, that, although the school and the due instruction of the scholars was one of the principal objects of the charitable foundation, yet the due performance of divine service in the chapel, for the general use of the inhabitants of the hamlet and its vicinity, was a primary duty and obligation imposed upon the charity and the wardens and governors, and that the chapel constituted \*a part of the charitable foundation, and was not merely auxiliary and secondary to the school.

[ \*511 ]

It also appeared, that, the chapel, being in need of repairs, and much too small for the spiritual wants of the hamlet, the wardens and governors had been desirous either of enlarging it or of pulling it down and erecting a new chapel. For this purpose voluntary subscriptions to the amount of 1,745*l.* had been collected; the commissioners for building churches were willing to make a grant of 6,000*l.*; and a bill had been introduced to enable the wardens and governors to carry those objects into effect, and also to confirm their title, which had been questioned by the Bishop of London, on the ground that the grant of his predecessor Grindall was not valid. After this bill had passed the Lords, it was rejected in the Commons, as coming within the technical description of money bills. Another bill for the same purpose was introduced, but was opposed by the relators so obstinately, that it became impossible, from the advanced stage of the session of Parliament, to carry it through; and it was therefore abandoned.

The evidence in the cause proved that the hamlet of Highgate was situated in three different parishes, the churches of each of which were at a considerable distance from it; that the inhabitants of Highgate had no sittings in any of the three churches; that there was no other parochial chapel within the hamlet; that the chapel in its present state was capable of containing from 700 to 800 persons; that there were a considerable number of free sittings in it for the poor; that the master of the school performed service in the chapel, and discharged other

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 [ \*512 ]

pastoral duties, which were of great advantage to the inhabitants ; that many of the inhabitants were in the practice of attending the chapel on \*Sunday, and several of them, on Wednesday and Friday, that the system of education adopted in the national schools, and known by the name of " Bell's system," or the " Madras system," had been introduced ; and that the school was attended by about 110 boys.

Three questions were discussed :

First, whether the wardens and governors executed their trust duly by permitting the school to be conducted, not as a grammar-school for instruction in the classical languages, but as a place for teaching English, writing, and arithmetic ?

Secondly, whether they executed their trust properly by permitting the master to devote his time chiefly to the discharge of clerical duties, while he left to an usher the actual labour of teaching, and exercised only an occasional and general personal superintendence over the business of the school.

Thirdly, whether the chapel was to be considered a chapel of ease, to be enlarged and repaired out of the revenues of the charity for the general accommodation of the inhabitants of Highgate, according as the increase of their number might require ; or whether it was to be considered as a chapel annexed and belonging to the school ?

[ \*513 ] The wardens and governors presented a petition in the cause, praying that they might be allowed the costs which they had incurred in their attempts to procure an Act of Parliament ; insisting, that, though they had failed in securing to the charity the benefit which they had intended, they had acted honestly and from a sincere \*desire to execute their trust in the most advantageous manner for those who were the objects of it, and that therefore the costs incurred in parliament ought to be allowed them as disbursements in the discharge of their duty.

*Mr. Horne and Mr. Temple* for the relators.

The *Solicitor-General* (*Sir Charles Wetherell*), *Mr. Shadwell*, and *Mr. Lynch*, for the wardens and governors.

*Mr. Bickersteth* for Lord Mansfield, one of the governors.

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—

After the conclusion of the argument, the LORD CHANCELLOR stated the purport of the various instruments, and made several observations, of which the following were the most material:—

The question as to the school may be subdivided into two branches:—What is the sort of school which the Court, if applied to immediately on the institution of the charity, would have established in the execution of the trusts? and what is the sort of school which the Court will be obliged now to insist on having carried on at Highgate, regard being had to what has taken place between the middle of the sixteenth century and the present period? Now, notwithstanding the peculiarity in the statutes as to reading and writing, it appears tolerably clear, taking the whole together, that this was intended to be a free grammar-school, in which persons were to be liberally educated; and that, according to the construction of the phrase “free grammar-school,” and attending to what were to be the qualifications of the \*person who was to conduct the school, this school was to be carried on in such a manner, that, at least, there might be an opportunity for the specified number of boys (a number which the Court would, perhaps, have power to increase, if it were necessary,) to be taught, not merely the English grammar, but the elements of the learned languages.

[ \*514 ]

If it can be made out, that this originally must have been a school in which boys were to be taught the elements of the learned languages, the next question would be, attending to all that has passed from the time of its institution down to this moment, and particularly to the statutes, and to the practice of the wardens and governors, whether the constitution and nature of the school has been legally and effectually changed.

Now, that view of the case will turn entirely on this,—whether, by positive statute, the wardens and governors could, as trustees of this charitable institution, alter the nature of the school? There have been a great many cases in this Court, undoubtedly, in which, when the particular things prescribed to be done could no longer be carried into effect, a change has been made; a

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change approaching as nearly as might be, in what can be executed, to that which can no longer be executed; and such change has been sanctioned by the Court; but if the original trusts are as capable of been executed at this day as at the time of their original creation, the only question is, whether there was authority to change the nature of the trust? Now, looking at the instruments, it appears to me extremely clear, that it was the express intention of Sir Roger Cholmeley that the original nature of this institution should be preserved for ever.

[ \*515 ]

As to that part of the case which relates to the chapel, it has been argued, that the chapel and the chapel-lands \*were not given merely for the better maintenance of the school, but that there were two component members of the trust; and that there was not only a trust of the chapel-lands and the school-lands for the maintenance of the school, but also a trust of the chapel-lands and school-lands, as a distinct trust, for providing and augmenting, and enlarging, from time to time, a place of worship sufficient for all the religious wants of all the inhabitants of the hamlet of Highgate, however populous that hamlet might become.

\* \* \* \* \*

[With respect to the Bishop of London's grant, his Lordship said :]

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Now, suppose the Bishop to have had a power to grant the chapel and the other premises, but to have had no power to divest himself of the obligations (if any) that were fixed on him as the owner of the chapel, is there one single word in this instrument, which denotes any purpose on the part of the Bishop to create any trust except for the free-school? It is very true, that, if the Bishop himself was previously, in the nature of a trustee, under obligations as to this chapel, his grantees or feoffees would take the chapel subject to those same obligations; but it is not possible to say, on the instrument of grant itself, that the Bishop meant to enlarge the obligations that were affixed on him, whatever those might be, or to affix enlarged obligations on his grantee. This deed, as far as it goes, appears to me to be distinct evidence, that the Bishop meant to give the chapel and the lands of the chapel for the benefit of the free-school. On the other hand, it must be

admitted that the instrument \*would certainly not operate to discontinue, with reference to the grantees, any obligations which the grantor himself was under.

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The LORD CHANCELLOR further observed, that one important consideration was, whether the chapel, along with the land belonging to it, having been granted in pursuance, not of a licence to take lands for the benefit of the inhabitants of Highgate at large, but of a licence to a corporation to take lands by grant for sustentation of the school, Sir Roger Cholmeley, having a licence from the Queen to take lands for the benefit of the school, and taking lands expressed to be granted for the benefit of the school, could say, "This shall be a chapel of ease, which for the future shall be used, not for the benefit of the school, but for the benefit of the inhabitants of Highgate at large?"

THE LORD CHANCELLOR :

1826.  
Nov. 13.  
—

This matter comes now before me in consequence of difficulties having arisen as to the administration of a charity, which comprehends, or is represented to comprehend, estates given for the foundation of a school at Highgate; and likewise as to the effect of a gift of a certain chapel, and some fields or land belonging to that chapel. There have been attempts, with legislative aid, to regulate these matters, and to remove the difficulties, which, in the course of a very long period, had been introduced by something like inattention to the nature of the original foundation and of the dedication of the property in question; and, besides the information which has been filed by the *Attorney-General*, a petition has been presented by the wardens and governors of the school, praying, among other things, that the costs of the applications, which have been made to Parliament, may be allowed them.

I do not wish to be understood as expressing any disapprobation of these applications; but, upon looking into the subject, I find it impossible for me to allow them those costs, though I have no disinclination to do it, if I had authority. In *The Attorney-General v. Vigor*,† this Court did give the costs of an application that was made to Parliament without the previous

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† Apparently not reported on this point.

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sanction of this Court: but that case does not appear to me to furnish any precedent for allowing the costs in the present instance; and I do not recollect any case, in which the trustees of a charity have been allowed the costs incurred in endeavouring, without the previous sanction of the Court, to procure an Act of Parliament which did not pass. In the case of *Downing College*, the costs of the Acts of Parliament were allowed;—but those were Acts, both of which the Legislature thought proper to pass, and the benefit of both of which the college had; and this Court, I think, could not, with any propriety, dispute the prudence of measures, although taken without its authority, which the Legislature itself had enacted as prudent. What was done there cannot give any sanction to throwing the costs of an ineffectual application to Parliament on the funds of a charity, where the opinion of the Court, not being previously obtained, cannot be represented as differing from that of the Legislature. I regret, considering how the proposed bill miscarried, to have this difficulty; but I am afraid of making a precedent, which may lead trustees of charities to apply to Parliament, passing by the Court, which, for many important reasons, should be first consulted as to the fitness of such applications. There have been, within my own experience, many cases of applications by trustees of charities to Parliament, which have failed; and I recollect no instance, where the Court had not authorized the application, in which the parties have had their costs.

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Much evidence has been given relating to what I may call the comparative utility of carrying on the charity according to the original foundation, and of carrying it on according to the changes which have taken place, and which may be represented as aberrations from the original foundation of the charity—to the comparative utility of a school, as it should seem to have been proposed by the founder to be established, and of the school as it is now carried on—and to the benefit which the inhabitants of this district might receive from the enlarging of the chapel, and from other circumstances which have been stated as part of the plan adopted on one side. But, in giving my judgment, I have no right to look at the propositions, on

the one side or the other, as propositions, one of which promises to be more useful to the public than the other; because this Court has no jurisdiction to substitute a better proposition for a less useful one, but is bound to carry into execution the trusts of the property, as it finds those trusts to exist. If the Court is obliged to say that this school is, in the sense in which these words have always been used here, “a free grammar-school,”—the individual who holds the Great Seal, even if he were perfectly convinced that a free grammar-school could be of no use or of little use, would be bound to carry on the foundation as the author of the foundation meant it should be administered; and there is no power, at least none here, to alter that foundation, with a view to any superior benefit which might arise from an institution of a different nature, however desirable it might be, if it were within the scope of my authority, to substitute the one for the other. Neither can I enter into the consideration, whether the labours of the present master of the school, as a minister exercising spiritual duties in the place or in the neighbourhood, are more beneficial to the public than the exercise of his duties, such as, it is asserted, they have \*been prescribed by the nature of this foundation. If the foundation of this charity requires from him different duties from those which are now discharged by him, the comparative utility of what he now does, and of what would be so required of him, is a matter to which, in this Court, I cannot pay any attention. My duty is to enforce the trusts as they stand. The founder was the person who was to judge, how far his institution was likely to be useful to the public. \* \* \*

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It appears, that the Highgate school was founded about the year 1565, by Sir Roger Cholmeley. Prior decisions on the subject would authorize and require me to say, that, when a free grammar-school is instituted, it does not mean a school for teaching merely reading and writing, but it is to be a school for grammar in this sense, that boys are there to be taught those languages which, we know, are taught in almost all of what are called Grammar-schools in the kingdom; and let it be observed, that it was a great part of the policy of the times in which this school was founded, that grammar-schools should



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be instituted over almost the whole of the kingdom. Whether those institutions were or were not useful in promoting the progress of the Reformation, is a question which it would not be very difficult to solve; but that it was apprehended that they would be extremely useful to the progress of the Reformation, no man can doubt; \*and when we look at the 1 Edw. VI. c. 14, we see that one great object of the Legislature in dissolving many of the chapels, chantries, &c. which then existed, was for the very purpose of instituting these grammar-schools. The recital in that Act is this: "The King's most loving subjects, the Lords spiritual and temporal, and the Commons, in this present Parliament assembled, considering that a great part of superstition and errors in Christian religion had been brought into the minds and estimations of men by reason of ignorance of their very true and perfect salvation through the death of Jesus Christ, and by devising and fantasizing vain opinions of purgatory and masses, satisfactory to be done for them which be departed; the which doctrine and vain opinion by nothing more is maintained and upholden than by the abuse of trentals, chantries, and other provisions made for the continuance of the said blindness and ignorance; and further considering and understanding that the alteration, change, and amendment of the same, and converting to good and godly uses, as in erecting of grammar-schools, to the education of youth in virtue and godliness," &c. The first object here stated is, the erecting of grammar-schools for the education of youth; and we know that, in point of fact, about the time of Edward the Sixth, and in the beginning of Queen Elizabeth's reign, grammar-schools were instituted all over this kingdom. I believe, from one end of the kingdom to the other, one will find, almost every where, grammar-schools established at that time, in consequence of the authorities given by the Act which I have referred to. If it be asked, what those grammar-schools were?—nobody can doubt that they were not schools for the purposes of teaching merely reading and writing; but they were schools for the purpose of carrying on that species of learning, which, to this hour and to this day, is taught in most of \*those schools. That there have been changes made in many of them, and made without due authority,

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under the notion that education might be more usefully conducted upon another plan, is unquestionable: but if the time shall come when this Court shall be asked, whether these changes have been properly made and by due authority—perhaps there are in this country individuals who may then be of opinion, that the persons, who have made changes in such establishments, would have acted more wisely, if they had not acted on their own authority.

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\* \* \* \* \*

If we look into our books, we shall find different representations of the meaning of the words “a free school.” The weight of authority is, that even those words alone mean a free grammar-school; but all the authorities appear to be alike, where the words are “grammar-school,” or “free-grammar school.” On this point *Cox's case*† is a material authority as to the meaning of the phrase “grammar-school.”

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\* \* \* \* \*

Now it was a very likely thing that Sir Roger Cholmeley (if the nature of this chapel was such, as contra-distinguished from a chapel of ease and chapels of other natures, that it could be attached to his school), should annex to his foundation a chapel, like this, being that species of place for public worship which many of these schools have connected with them. And, as the institution of these grammar-schools was expressed by the \*Legislature to be for the purpose, among others, of forwarding the progress of the Reformation, we find in almost all of them provisions made, that there should be, to a considerable extent, prayer and attendance upon public worship, according to the ritual of the reformed church. I am old enough to remember, that, when I had the benefit of an education at one of these grammar-schools, that education was carried on in what I believe was once a *capella* or *sacellum*; that the boys educated there, were headed by their venerable master to church constantly upon Sundays; and that that part of the duty of a master of a free grammar-school was in those days as much attended to as teaching the scholars the learning which they

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† 1 P. Wms. 29.

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ought there to acquire. Whether that practice is now continued in grammar-schools, I do not know; but this I know, that it ought still to be attended to as much as ever.

On the 14th of December, 1571, after the death of Sir Roger Cholmeley, certain statutes were made, which were signed by the then Bishop of London. After various recitals, these statutes proceed as follows: "We order and decree, according to the will, mind, and intent of Sir Roger Cholmeley, Knight, founder of this free school," (so that we have here recorded what was his mind and intent,) "that there be an honest and learned clergyman appointed and placed to teach the scholars coming to this free school, which schoolmaster, that shall be placed, be graduate of good, sober, and honest conversation, and no light person." Now, first with respect to the qualification of the master, he was to be a learned schoolmaster, and, as evidence of his being such, he was to have the character of a graduate. Therefore, he could not be a clergyman, however respectable or however learned, who had not had a degree conferred on him: and I have looked through all the appointments \*of masters which have been laid before me, and there is not one of them who was not a graduate. They were required to be persons sustaining the character of a graduate as a security for their being learned; in some of these appointments it is expressly stated that they are to teach in reading, writing, and grammar; and, in most of the licences, they are appointed expressly upon condition that they observe all these laws, ordinances, and statutes. Being required to be so qualified, and being appointed by instruments imposing on them the duties which are prescribed by these statutes; how is it possible to doubt, that originally at least, they were to be persons able to do—what?—not surely to appoint an individual to teach boys reading and writing, and to walk two or three times in a day to the school, in order to take a view of it, and to see whether an usher was doing his duty. Learning was not required, nor any thing else, if that was to be all the duty of the master. With respect to any spiritual duties, it does not appear to me that the person who was appointed the schoolmaster, and who, in all probability, would be a clergyman, had imposed on him, originally, any spiritual duty except for the purposes of the

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school. The accidental access of the inhabitants of Highgate to the chapel of the school, in which divine service was performed according to the statutes and ordinances, was a thing that no man could think of preventing ; but it is a different question, whether such access was to form a right in them to have this, which was not a chapel of ease originally, converted into a chapel of ease. What is it that is to be done by the person who is appointed master ? He is to teach and instruct young children (and here follow words which I believe have very often misled persons on this subject), “as well in their A, B, C, &c.” If you are to instruct children in their A, B, C, it is said that cannot possibly mean that they \*are to be taught to read Livy and Virgil, and other Latin or Greek books ; it must mean that you are to teach them their alphabet. But the expression is a very singular one. The master is to instruct the boys “in their A, B, C, and other English books.” These words, “other English books,” make it clear, (and we know, in point of fact, so it was), that the A, B, C, meant a book : and it is often mentioned along with another book, the primer. The statutes add, “and to write, and also in their grammar, as they shall grow ripe thereto.” Now, is not this the course which is taken in many of the grammar-schools in this kingdom ? In many of them, the boy who comes to be taught grammar, must have this elementary knowledge before he is admitted ; in others of them, he is to acquire this elementary knowledge in the school itself, but he is to acquire it not for the purpose only of acquiring such the elementary knowledge, but in order to set his foot, as it were, on the first step of the ladder, from which he is afterwards to go up higher.

That this, therefore, was a school originally instituted for the purpose of teaching grammar, by which we are to understand that species of knowledge which is taught in the free grammar-schools of this kingdom, is a point on which it is excessively difficult to entertain any doubt.

Is it then possible to say, that, if there is in Highgate a school, such as what are called the national schools, where boys are taught to read and write in the manner usual in those schools, the master of such school is a master doing the duty, which the master, appointed under the authority I have read, is

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required to do? Is a master, who appoints an usher to teach the boys to read and write, and goes into the school, if you please, twice \*a day, to see that the usher does his duty, a master who, according to the language of the statutes, “teaches and instructs young children in their A, B, C, and other English books, and to write, and also in their grammar, as they grow ripe?” If he is not, though he may be doing something which is infinitely more useful, this Court cannot authorise such a change of duty; and, if applied to, it must enforce the performance of the duty which was originally imposed. It is obvious, that, in a long series of years, there may have been such a departure from the original nature of the trust as to cause much difficulty in restoring it; but, whatever the difficulty is, the Court must struggle through it: and the Court can no more say that a school, which was originally a grammar-school, shall not be restored, than it can say that a school, which was originally a grammar-school, shall be turned into a national school.

When we look at the depositions in this cause, we find that the weight of evidence is that, so far as the memory of living individuals extends, there was in this school a total neglect, or nearly a total neglect, in teaching what, in a free grammar-school, ought to be taught. But evidence as to what has happened in the time of living memory cannot tell us what passed between 1567 and the period to which living memory goes back; and it does appear, even in the depositions, that some boys were taught grammar; and the collection of books made for the school tends to show what this school originally was. Upon the whole, therefore, looking at the effect of all the instruments, and at the depositions, I feel myself bound, notwithstanding what has happened, to say, that this school is a free grammar-school in this sense—namely, that those, who begin to acquire elementary knowledge there, are persons who are entitled to be taught grammar there, in the sense which I have put \*on the word, if they think proper to stay for that purpose.

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\* \* \* \* \*

The next question (and it is a very material one) relates to the chapel. It is contended, on the part of the inhabitants of a certain district, and, as it seems to me, by the wardens and

governors of the possessions of the school, that the chapel was what might be termed a chapel of ease, or was to be considered as a chapel of some sort or other, for the general use of the hamlet. It has been represented as a chapel, which in its nature required, that, not for the benefit of the school merely as the primary object, but for the benefit of the inhabitants of Highgate, the wardens and governors, in administering the property of the school as a charitable institution, including the chapel and lands, (which, let it be recollected, are conveyed as \*property, a singular thing to happen to a chapel of ease), should from time to time repair, and not only repair, but enlarge it for the benefit of the inhabitants of that district, let those inhabitants increase as much as they may possibly increase, and even if their spiritual wants were to require a place of worship, the maintenance of which might run away with nine-tenths, or with a very large proportion of the profits of that property which was intended, chapel and all, for the benefit of this school. Now, when I look at the expressions in the instruments under which the chapel is conveyed; when I consider the intent and purpose with which such a chapel might be annexed to a free grammar-school; and when I recollect how a chapel of ease is contradistinguished by the use to which it is appropriated, and the use to which persons have a right to say it shall be appropriated (a use which would make of no avail all such words found in these instruments as “for the benefit of the school, and for no other use, intent, and purpose whatever”); I cannot bring myself to doubt, that this originally was not a chapel of ease, nor a chapel of any nature in which the inhabitants of a district, *qua* inhabitants, had a strict right to say that which is now contended for, either by them, or by others on their behalf. It appears to me that this was a chapel, which, as property, was devoted originally to the purposes of the school.

\* \* \* \* \*

The next question is, Has the dealing with respect to this chapel, when it was enlarged, when the burial-place too was enlarged, when there were more pews placed in it, when there was a greater access of inhabitants to it, when consecration was added from time to time; has such dealing with the property—have those acts, to which the trustees of that particular day

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acceded,—so converted the nature of the charity, that other subsequent trustees were ever afterwards bound to continue to do the same thing, whenever the inhabitants might require a larger place of worship? I do not apprehend that such would have been the consequence of the acts of the trustees, even if their acts had been of a very different nature from what they were. It is true that the wardens and governors did contribute considerably to the enlargement of the chapel, and to the other changes which I have been alluding to. But is there any thing that authorizes me to say, that they did so contribute as matter of obligation imposed on them by the nature of their trust? By no means.

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Here was a purpose of common \*utility, to which many persons subscribed merely from the motive of doing good; and, among others, the wardens and governors subscribed. The very utmost that human ingenuity could propose as a question, would be, whether the wardens and governors were obliged to keep the chapel, in its present magnitude and size, for the benefit of the inhabitants? But what is there that can be fairly looked at as a ground for contending, that as the inhabitants in the neighbourhood of Highgate increase, so the rents and profits of this charity are to be applied in providing, gratuitously, a place of worship for the inhabitants so increasing in their number? I cannot see how it is possible to say, that the governors are under any obligation to enlarge this building; and let it be remembered, that, if they are not bound to enlarge it, they are persons who hold the property upon a trust, from which this Court cannot authorize them to depart. Once state the nature of the trusts, and the question is at an end. How, out of the applications of the property in times past to purposes not consistent with the nature of the trusts, you are to derive and create a new obligation upon the trustees to divert the property from the original trusts, is altogether incomprehensible.

My opinion, therefore, is, that this is a trust for the support of a free grammar-school; that, the trust being for a free grammar-school, the Court can do nothing but enforce that trust; and that the wardens and governors, as trustees of this charity, are under no obligation whatever to enlarge this chapel.

\* \* \* \* \*

## "AS TO THE PETITION.

"I can do nothing with it consistently with the rules and powers of the Court but dismiss it, if the parties won't come to some agreement; but not with costs, because it seems that nothing can be done as usefully without an Act of Parliament as with an Act of Parliament, if Parliament will grant it."

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## PORTMAN v. MILL.†

(2 Russ. 570—575.)

1826.  
Feb. 3.  
Lord  
ELDON, L.C.  
[ 570 ]

A contract for the purchase of a farm described it as containing "349 acres or thereabouts, be the same more or less;" and stipulated that the premises should be taken at the quantity above stated, whether more or less: in fact, the farm consisted of only 349 customary acres, which were less than the same number of statute acres by about 100 acres or upwards. On a bill being filed for specific performance, the purchaser, admitting that he had been for several months in possession of the property, and had exercised acts of ownership over it, on the faith that a good title to 349 acres would be shown insisted that, in the contract, acres meant statute acres, and that he was not bound to perform the contract unless 349 statute acres were conveyed to him: Held, that in such a case, a reference of title would not be directed on motion.

THE defendant Mill, by his agent Fisher, contracted to purchase from the plaintiff certain lands called or known by the name of Wellow Farm, "containing by estimation 349 acres, or thereabouts, be the same more or less." The agreement contained a stipulation, "that the parties shall not be answerable or accountable for any excess or deficiency in the quantity of the said premises, and that such excess or deficiency (if any there should happen to be) shall not vacate or affect the present contract, but that the premises shall be taken \*by the said George Dike Fisher at the quantity above stated, whether more or less." The actual quantity of land appeared to be only 196 statute acres, exclusive of 52½ acres of woodland; so that there was a very great deficiency, if the statement in the contract was to be interpreted as referring to statute acres.

[ \*571 ]

The bill was filed by the vendor for specific performance. It stated that the term "acres" in the agreement meant customary acres, and not statute acres; that Fisher was well acquainted

† *In re Terry and White's contract* (1886) 32 Ch. Div. 14, 55 L. J. Ch. 345.



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with the actual extent of the lands; and that the defendant, having entered upon the farm, remained long in the possession of it, and dealt with it in every respect as his own property.

The defendant by his answer, though he alleged that Fisher had exceeded his authority, admitted the agreement, and his own adoption of it, and his having taken possession of the farm. But he stated, that, at the time when the contract was entered into, he and his agent understood the estimate of quantity contained in the agreement as referring to statute acres; that he would not have bought the property, if he had supposed that customary acres were meant; that he had never authorized Fisher to buy customary acres; that the vendor, knowing the actual extent of the farm, was bound to have stated it in unambiguous terms; and that possession, which had been taken only upon the faith that the contract was to be performed by shewing a good title to the quantity of land mentioned in it, was abandoned as soon as the great deficiency in quantity was discovered. He further alleged, that the vendor could not shew a good title; and he insisted, that, for the reasons appearing in his answer, he ought not to be compelled to perform the agreement.

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Upon the coming in of the answer, the plaintiff moved for the common reference of title.

*Mr. Sugden and Mr. Swann*, for the motion. \* \* \*

*Mr. Shadwell and Mr. Lynch*, *contra* :

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\* \* There being substantial questions in issue between the parties, independently of the question of title, an order of reference will not be made.

[The cases cited included *Blyth v. Elmhirst*,† *Boehm v. Wood*,; and *Withy v. Cottle*,§]

THE LORD CHANCELLOR :

In this cause, the question is—not whether the defence is hopeless, but whether there is not something put in issue, beyond the mere title, which will require that the cause be heard at least on bill and answer. On the face of the contract, the vendor

† 12 R. R. 182 (1 V. & B. 1).

§ 23 R. R. 187 (1 Sim. & St. 174).

‡ 21 R. R. 213 (1 J. & W. 419).

proposes to sell to the vendee a farm, containing by estimation 349 acres or thereabouts; and one question, independent of the title, is, what the word “acre” in that agreement means. The defendant says, he understood it to mean statute acres; the plaintiff alleges, that he meant only \*customary acres, which, according to the custom of that part of the country, do not contain much more than one half of the quantity of an equal number of statute acres.

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Then it is said, that the defendant has placed himself in such circumstances that he cannot avoid the performance of the contract, even if the Court were of opinion that “acres” in the agreement meant statute acres, and not customary acres; for he entered on the estate after the time when it is impossible, supposing him to be right in his construction of the contract, that he should not have discovered the difference between the actual extent of the farm and 349 statute acres: nay more, he planted it, and remained for months in possession. On the other hand, he alleges, that, on the sound construction of what is stated in his answer, he has there said, that, notwithstanding he has done such and such acts, he is not bound to perform the contract, unless a good title is made to 349 statute acres or thereabouts. His defence may fail; but the question at present is—not whether he has a good defence to the suit,—but whether he has not a right to say, “There is enough in my answer to shew, that there are other questions, besides the question of title, which must be decided in this cause.” To me it appears that there is enough in his answer to enable him to say so; and, therefore, I do not think that this case falls within the rule, which permits a reference of title to be made on motion, when the question of title is the only substantial matter in dispute between the parties.

As to the stipulation in the contract,—that the parties shall not be answerable for any excess or deficiency in the quantity of the land, and that the premises shall be taken at the quantity before stated,—I never can agree, \*that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as is alleged to exist here.

[ \*575 ]

*The motion was refused.*

1823.  
Nov.

# SIMPSON v. HILL.

(2 L. J. Ch. 32—35.)

LEACH, V.-C.

[ 32 ]

Construction of correspondence as constituting an agreement.

The son grants an annuity secured upon a living, of which he is incumbent and his father patron: The annuitant having proceeded to a sequestration of the living, for payment of his arrears, the father assures him that he will sell the advowson, and redeem the annuity out of the proceeds of the sale, and the annuitant, relying on that assurance, withdraws the sequestration; subsequently, the advowson is sold, and the son vacates the living, so as to defeat the annuitant's security: Held, that the annuitant cannot compel the father to perform his agreement to redeem, inasmuch as that agreement was an agreement without consideration.

In July, 1816, Rowland Hill was rector of the parish of St. Mary-on-the-Hill, in the city of Chester, and, under the provisions of an Act, passed in the fifty-second year of the late King, for enclosing the forest of Delamere, had been appointed by his Majesty rector of Delamere, but was not actually instituted or inducted into that benefice. Being thus situated, he, by indenture, dated the 19th of July, 1816, made between him of the one part, and the plaintiff of the other part, granted to the plaintiff, in consideration of 2,000*l.*, an annuity of 274*l.* 14*s.* for a term of 99 years, if he, Rowland Hill, should so long live, and charged the \*annuity on the rectories of St. Mary-on-the-Hill and Delamere, and further secured it by a warrant of attorney.

[ \*33 ]

In the beginning of 1818, the annuity being in arrear, the plaintiff sued out a writ of *levari facias* on the judgment, which had been entered upon the warrant of attorney, and proceeded to a sequestration of the rectory of St. Mary-on-the-Hill. The right of presentation to that living belonged to Robert Hill, the father of Rowland; both of these gentlemen were exceedingly desirous that the sequestration might be withdrawn, inasmuch as the continued enforcement of it would be an impediment to the execution of a plan, which the father entertained, of selling the advowson of St. Mary, and of applying part of the proceeds for the benefit of the son; and likewise to a scheme, which they were then prosecuting, for obtaining from the Crown, through the mediation of the bishop of the diocese, an augmentation of the rectory of Delamere.

The bill, after stating these circumstances, alleged, that the father and son, to induce the plaintiff to withdraw the sequestration, proposed to the plaintiff's solicitor to give a joint bond for securing the arrears of the annuity, and to redeem the annuity itself out of the proceeds of the sale of the advowson, and that this proposal was accepted by the plaintiff. The joint bond was executed, the sequestration was withdrawn, and the advowson was sold, in August, 1819, for upwards of 7,000*l.*; a great part of which was applied in discharge of debts of the son. Shortly afterwards, Rowland Hill was inducted into the living of Delamere, and thereby vacated the rectory of St. Mary-on-the-Hill. Thus the plaintiff lost the security which he had on the latter benefice; and the former was altogether unequal to meet the accruing payments of the annuity. The son was insolvent, and out of the jurisdiction; and the father, having refused to comply with his alleged promise to redeem the annuity out of the proceeds of the sale of the advowson, the bill was filed to compel him to redeem the annuity upon the terms upon which it was redeemable according to the original indenture.

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The defendant Robert Hill, by his answer, insisted, that the sequestration was withdrawn only on consideration of the joint bond given for the payment of the arrears for the annuity then due, and that he had not bound himself to apply any part of the proceeds of the sale of the advowson to the redemption of the annuity—asserting, first, that he had not made any promise or agreement to do so; and secondly, if he had, that such promise or agreement was without consideration.

*Mr. Bell, Mr. Horne, and Mr. Matthews*, for the plaintiff, argued, that there was contained in the correspondence of the defendant Robert Hill, with the solicitor of the plaintiff, such an agreement to redeem the annuity, as a court of equity would compel him to perform. The parts of the correspondence, on which they principally relied, were stated by his Honour in the judgment which he pronounced.

THE VICE-CHANCELLOR :

The single question here is—Has the plaintiff proved, not

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merely that Robert Hill assured him that he would, out of the proceeds of the expected sale of the advowson of St. Mary-on-the-Hill, redeem the annuity granted by his son (for a mere naked promise, given by a stranger, without consideration, cannot, however explicit in its terms, be enforced in a court of justice), but that Robert Hill entered into a contract, that, if the plaintiff would suspend legal proceedings, he would redeem the annuity out of the above-mentioned fund.

Throughout this case, one sees clearly, that the plaintiff did in fact suspend proceedings against the son, in reliance upon the father's promise, that the annuity would be redeemed. But it is not enough to make out a mere promise, on the part of the father, that he will sell the advowson and redeem the annuity: what must be proved is, an agreement, that if the plaintiff does some certain thing for the benefit of the son, then he, the father, will redeem the annuity; and it is not without reluctance that I find the conclusion forced upon me—that Mr. Robert Hill has not bound himself by a valid contract to do that, which the plaintiff, relying upon his assurance, considered that he had a right to expect from him.

[ \*34 ]

The first letter relied on by the plaintiff, is that of the 31st of October, 1817, addressed to the plaintiff's solicitor; in which Rowland Hill says, "I am come over to \*Buxton for the purpose of laying my affairs before my father. He has agreed, that the advowson of St. Mary's shall be sold, in order that the annuities may be redeemed. It is needless to add, we conclude that your clients will be content with this arrangement." Then comes a postscript signed by the father:—"My son Rowland having consulted me upon the above subject, I entirely agree with him as to the sale of the advowson of St. Mary's, and consent thereto." This is a direct assurance given by the father, that in order to redeem the annuity, he will immediately sell the living. But assurance is not enough; it is not a stipulation, that, if Simpson would not proceed in enforcing his legal remedies, he, Robert Hill, would redeem this annuity. Even if the assurance had been accompanied with such a stipulation, it would still have been necessary to go on and prove acceptance, by the other party; for, till such acceptance, the matter at most would be

mere proposal. Now, it is clear, that the plaintiff's solicitor did not consider his client as having made any engagement not to avail himself of his legal remedies: for in a letter, dated the 11th of February, 1818, and addressed to Robert Hill, he says, "As nothing has been done on the part of Mr. Rowland Hill, my clients have become extremely dissatisfied, and I am now much blamed by them for not proceeding, and which I can no longer avoid, however painful the consequences may be." This threat to proceed is conclusive evidence, that he did not think there existed any contract, which precluded him from employing legal process.

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There is another part of the correspondence, on which the plaintiff has relied. In a letter of the 7th of April, 1818, Mr. Robert Hill says—"I am confident the living will very soon be sold, and your debt paid." This again is mere assurance. But then there comes a letter of the 14th of the same month, from which counsel have endeavoured to deduce a contract, that, if the plaintiff would withdraw his sequestration, Mr. Robert Hill would enter into a bond for the payment of the arrears, and would sell the living. The words of Mr. Robert Hill's letter are—"I expected as a thing of course, that, if I joined in a bond, both the execution and the sequestration would be stopped; and then there will be less impediment in the way of the sale of the living:" and the argument founded on that passage is, that the sale of the living is one of the conditions, on which he proposed that the execution and sequestration should be stopped. Such is not the fair or true construction. He is anxious that the sequestration and execution should be withdrawn; as a consideration to induce the solicitor to withdraw the process, he offers to give his bond for the arrears; and he mentions, not as a condition of the withdrawal of the sequestration, but as a reason for his anxiety to have it withdrawn, that there will then be less impediment to the sale of the advowson. It was in this light that it was viewed by the parties themselves; for the answer to it says—"I beg to assure you that the writs of sequestration and execution shall be immediately withdrawn on your executing the bond for securing the arrears due." Here the solicitor of the plaintiff treats the execution of the bonds as

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the sole consideration for the withdrawal of the execution and sequestration ; that withdrawal is not once referred to as proceeding upon the condition, that the living should be sold : though the sale is alluded to by the father, as furnishing the motive, which interested him in having the sequestration removed.

There is also a letter of the 24th of December, 1819, (a date subsequent to the sale,) in which Mr. Robert Hill says—" I cannot now state so exactly when I wish to redeem the whole of my son's debts to your clients, as I could have done when I first wrote to you on the subject, and when I had the whole of the purchase money for the living of St. Mary's, Chester, in my hands." But even if this could be construed into an agreement or a promise, still it would be a promise without consideration.

Upon the whole, I am of opinion that this plaintiff has not made out his case—that, though it is plain that at the time when he withdrew the sequestration, he did so for the purpose of assisting the father in the sale of the advowson, and from confidence in his assurance, that, as soon as the sale was effected, the annuity would be redeemed, yet this understanding of the parties was not put into a legal form—that the father's assurances were bare naked \*promises, without consideration—and therefore, that I must dismiss the bill as against Mr. Robert Hill.

[ \*35 ]

In a case, however, of a nature like the present, I cannot make him pay the defendant's costs: let the dismissal, therefore, be without costs.

## GORDON v. RUTHERFORD.†

(2 L. J. CH. 50—53; S. C., T. &amp; R. 373.)

1823.

Nov. 18.

Rolls Court.

PLUMER,

M.R.

[ 50 ]

A testator directs that his trustees shall stand possessed of a certain sum of stock, upon trust for D. until D. shall have attained his age of 25 years, with a direction that they shall transfer the stock to D. as soon as they in their discretion think proper, and that it shall sink into the residue, which is given over in case D. dies without lawful issue before he receives the bequest; held, that the right to the dividends which accrue before D. has attained his age of 25 years, or has had a transfer made to him, is suspended to go finally along with the capital.

If a testator directs that A. shall carry on the testator's trade, with a capital taken from the testator's personal estate, and shall educate and support D., and bind him apprentice to himself, and that, upon the expiration of the apprenticeship, or so soon as A. shall think D. capable, A. shall take D. into the business as a partner; held, that D. is not entitled to claim a share of the profits from the death of the testator, and \*that he has no right to be admitted a partner at any time, unless his conduct is such as to render him not unfit for the situation.

[ \*51 ]

THE testator gave to his trustees and executors a sum of 33,339*l.* 6*s.* 8*d.* 3 per cent. consols, bank annuities upon trust, to pay to his widow an annuity of 1000*l.* a-year during her life; then, immediately after his death, upon trust, that they should transfer to the testator's nephew, William Forbes Stuart, one moiety of the said sum of 33,339*l.* 6*s.* 8*d.* stocks; and upon further trust, as to the sum of 16,666*l.* 13*s.* 4*d.* the other part and remainder of the said sum of 33,339*l.* 6*s.* 8*d.* bank annuities, that his trustees and executors should stand possessed thereof, upon trust, for his nephew Donald Gordon, until he should have attained his age of 25 years; and the testator directed his said executors and trustees, and the survivor of them, to transfer the same to Donald Gordon for his own use and benefit, when and as soon as they should in their discretion think proper; and in case Donald Gordon should die without lawful issue, before receiving the bequest, the said sum of 16,666*l.* 13*s.* 4*d.* was to sink into and become part of the residue of the testator's estate. Afterwards the testator, in the event of the death of William Forbes Stuart without issue, devised certain freehold premises to trustees, upon trust, to apply the profits thereof to the use of Donald Gordon, until he should attain his age of 21 years, and afterwards to him

† *In re Judkin's Trusts* (1884) 25 Ch. D. 743, 53 L. J. Ch. 496.



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in fee. He then ordered the trade, in which he was concerned, to be carried on after his decease, by William Forbes Stuart, with a capital of 10,000*l.* out of the personal estate, or such other capital as might be sufficient for that purpose; and continued in the following words: "I direct and request, that the said William Forbes Stuart do and shall take under his care and protection, and educate and support the said Donald Gordon, until he shall have attained a proper age to be bound apprentice; and when, and so soon as he shall have attained that age, then I direct, that the said William Forbes Stuart shall bind the said Donald Gordon apprentice to himself; and from and after the said apprenticeship shall have expired, or so soon after as the said William Forbes Stuart shall in his judgment think the said Donald Gordon fit and capable, he the said William Forbes Stuart shall take the said Donald Gordon into the said trade and business, as a co-partner therein, and that the said Donald Gordon, shall have one-third part or share of the profits of the said business with the said William Forbes Stuart; it being my particular will and desire, that the said trade and business shall be always carried on in the name, or under the firm of James Stuart and Co., and no other." The residue of the personal estate was bequeathed to William Forbes Stuart. Donald Gordon was about 12 years of age at the filing of the bill.

The first question was, whether, from the death of the tenant for life till Donald Gordon attained the age of 25 years, the interest of that moiety of the stock which was bequeathed to him, belonged to him.

*Mr. Wingfield* and *Mr. Roupell* were for the plaintiff, Donald Gordon.

*Mr. Shadwell* and *Mr. Barber* for the residuary legatees.

For the defendant were cited: *Palmer v. Mason*, 1 Atkins, 505. *Herle v. Greenbank*, 3 Atkins, 697, 718.

THE MASTER OF THE ROLLS:

In considering this case, three views of it present themselves.

First,—Is the interest of this portion of the testator's property, during the minority of this infant, to go immediately to the infant? Secondly,—Is it to go immediately to the residuary legatee? Thirdly,—Is the determination of the right to the interest to be suspended, till it is finally seen what the event may be with respect to the legacy itself?

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In the first place, I do not think that this case can be decided on authority. The words employed here, are very different from those which are commonly used in wills. The only use of authorities in such a case, is to furnish us with general principles which we may take along with us in considering the whole frame of the will. This is a case of a legacy, clearly not vested. The testator constitutes a capital composed of stock, yielding a precise revenue of 1,000*l.* a year; and he directs this annual revenue to be paid to his widow. After her death he divides the stock; giving one moiety of it to William Forbes \*Stuart, who is also residuary legatee; and, as to the other moiety of it, he gives it to certain persons in trust for Donald Gordon, until he shall attain the age of 25 years. If the will had gone no further, it could not have been pretended that there was any direct gift to Donald Gordon; nor would there have been any direction as to the disposition of this moiety of the stock, after Donald Gordon had reached the specified age. But the testator afterwards proceeds to direct his executors and trustees to transfer the moiety of the stock to Donald Gordon, "when and so soon as they should in their discretion think proper." There are no words of gift to Donald Gordon, except through the medium of the discretionary transfer by the trustees; nor is there any fixed time at which transfer is to be made.

[ \*52 ]

Then comes the question, Can it be the true construction, that the dividends are to go to any body else, during the interval between the death of the testator, and Donald Gordon attaining the age of 25 years, or having the transfer made to him? Till he attains that age, the trustees are to hold the stock in trust for him; but if the dividends were to go in the mean time to William Forbes Stuart, the executors would be trustees for that gentleman, and not for Gordon. And though the trust is only of the *corpus* of the legacy, yet the words that carry the principal, must carry

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also the dividend accruing upon it in the mean time. If it had been the testator's intention that William Forbes Stuart should have these dividends, would he not have said, that in the mean time the dividends shall go to my residuary legatee? He has said nothing of the sort; and not only is he silent on the point, but he has declared in express terms, what is to go to his residuary legatee; and the only event in which the residuary legatee is to have an interest in this bequest, is in case Donald Gordon dies without issue. There is, in fact, a gift by implication to the children of Donald Gordon.

This testator had no intention to separate the dividends from the *corpus* of the legacy; he meant generally, that the capital should draw to it the accruing interest; and the true interpretation of the bequest is this:—"During the period, which shall elapse before my trustees think fit to exercise the discretion I give them, the dividends and interest are not disposed of, except that they are reserved to abide the final destination of the capital. If at any time the stock is transferred by the trustees to Donald Gordon, from that moment, the trust, that is to attach upon it at my death, takes effect; and in giving him the stock, they in effect tell him to take also the dividends which they had been holding in trust for him." The testator meant that Donald Gordon should have the whole of this property, principal and interest, if he attained the age of 25 years; if he died leaving children, it was to go to them; and if he died without issue, then, and then only, was it to go to the residuary legatee.

The bias which the Court has in favour of making legacies vest, arises from a wish to provide for the maintenance of the objects of the bounty of testators. That consideration, however, can have no place here; for, in the subsequent parts of the will, the testator treats Donald Gordon as a person who had no certain income, and gives directions which proceed upon that view of his circumstances. He directs William Forbes Stuart to take him under his care and protection, and to educate and support him. Would this have been necessary, if Gordon had had 500*l.* a-year of his own?

At present, all that the Court has to do, is to negative immediate receipt of the dividends. Gordon is not entitled to

them ; neither is the residuary legatee. The trustees must wait the event of Donald Gordon's attaining the prescribed age, unless they choose to exercise their discretion earlier.

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A second question was, Whether, during the period of William Forbes Stuart carrying on the trade before Donald Gordon should be taken into partnership, the profits belonged exclusively to Stuart, or whether he was a trustee of any part of them for Gordon ?

#### THE MASTER OF THE ROLLS :

Unless there are very express words bequeathing a share of the profits, a minor, or apprentice, who cannot sustain the losses of the \*trade, will not be declared a participator in the gains. This testator, having carried on a beneficial trade during his life, was anxious that it should be continued after his death ; and he directs William Forbes Stuart, who had been previously admitted a partner, to keep a large part of his the testator's personal estate invested in it. With this capital it is to be carried on by William Forbes Stuart, that is, solely by him, and for his own profit. If Donald Gordon had been meant to be a partner immediately, why should the testator have ordered him to be supported by his residuary legatee, and to be bound apprentice to him ? How could this young boy be both apprentice and partner in the same commercial concern ? Besides, the time is expressly fixed when he may become a partner ; it is, when his apprenticeship shall have expired ; and even then, there is a discretion given to William Forbes Stuart ; for this young man is to be a partner, not in every event, but only if he conducts himself in such a way as not to be unfit for that situation.

[ \*53 ]

1824.

## JOHNES v. CLAUGHTON.

LEACH, V.-C.

[ 113 ]

(2 L. J. Ch. 113—119.)

Specific performance.

Construction of what shall amount to the waiver of objections to the title.

Under what circumstances acts of ownership will not bind a purchaser to accept such a title as the vendor can make.

Consent to accept a title, given under the influence of representations made on the part of the vendor, which turn out to be inaccurate, will not bind a purchaser.

If a purchaser, entitled by his agreement to possession, exercises acts of ownership under the persuasion that the title is perfect, and that nothing will intervene to prevent the completion of the agreement; he is not thereby precluded from having a reference on the question of title, as to objections not appearing on any abstract delivered to him prior to the exercise of the acts of ownership.

By articles of agreement, dated the 16th of August, 1814, made between Mr. Johnes (with the consent of the persons who were trustees of his estate for sale) of the one part, and Mr. Claughton of the other part, Mr. Claughton contracted to purchase, partly in possession and partly in reversion, expectant upon the decease of Mr. Johnes, the fee-simple of all the estates of that gentleman in the counties of Cardigan and Montgomery, together with the furniture (some specified articles excepted) in Hafod House. The price was fixed at 90,000*l.* Mr. Johnes was to deliver, on or before the 1st of September, then next, a complete abstract of the title, and was to make out a clear and good title to every part of the premises. On the 1st of January following, Claughton was to have a conveyance and to be put into possession of one part of the estate; on which occasion 20,000*l.* of the purchase money was to be paid. On the 1st of August, 1815, a farther sum of 15,000*l.* was to be paid; and the residue of the premises contracted to be purchased were then to be conveyed to Claughton, a life interest being reserved to Mr. Johnes. The rest of the purchase money (55,000*l.*) was to be paid by three equal instalments, at the end, respectively, of one, two, and three years from the death of Mr. Johnes; but upon 30,000*l.*, part of this balance, interest from the 2nd of August, 1814, was to be paid half-yearly. Mr. Johnes gave a guarantee, that, in case he lived three years or upwards from the 1st of

January, 1815, the yearly rent of the estate (computing the farm, then in his own occupation, at 400*l.*) should amount to 2,500*l.*; or, if the rental should fall short of that amount, that a deduction should be made from the balance of 55,000*l.*, in respect of the deficiency, at the rate of 25 years' purchase.

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On the 24th of April, 1816, Mr. Johnes died, having appointed his widow and Mr. Hugh Smith his executrix and executor. They, as his personal representatives, prayed, by their present bill, that Claughton might be compelled to perform his contract specifically.

The bill stated, and the answer admitted, that shortly after the execution of the articles of agreement, Claughton had been let into the occupation of the premises, of which he was to have immediate possession, according to the contract; that Johnes delivered an abstract of the greater part of the estates which were the subject of the agreement; that, at or about the time when the abstract was delivered, Mr. Hugh Smith expressly informed the defendant that Mr. Johnes had, by exchange or purchase, acquired various parcels of land, with the particulars of which he was not acquainted, but which he considered to be of small value; adding, that as those parcels had been many years in Mr. Johnes' possession, and were let intermixed with the ancient family estate, he thought they \*might pass in the general title; that Claughton replied, "that he had no wish to multiply abstracts," and that he never called for any further abstract, but that the plaintiffs afterwards delivered to him an abstract of title to the residue of the premises; that Claughton failed to pay the instalments at the fixed times, in the manner prescribed by the contract; that, after Mr. Johnes' death, Mr. Claughton entered into complete possession of the estates, and purchased from the executors the plate, wines, and other articles in and about Hafod House, which had been excepted in the agreement of August, 1814; and that he had exercised various acts of ownership, and even advertised the premises for sale. The plaintiffs contended, therefore, that he was to be considered as having accepted the title.

[ \*114 ]

In a letter dated the 5th of December, 1816, and written in answer to an application from Mr. Hugh Smith, to have the

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CLAUGHTON. contract completed, and for that purpose to have some deeds executed, of which the draft had been previously submitted to Mr. Claughton, the latter gentleman used the following words: "I shall be ready, as soon as the deeds are settled and executed in the form proposed by yourself, to pay whatever may be due from me, either on the score of interest or subsequent agreement with you as Mr. Johnes' executor."

Claughton, by his answer, and also by a cross bill, set up three defences.

The first defence was, that Mr. Johnes, before the agreement was entered into, delivered two rentals, one for 1814, which amounted to 2,138*l.*, and another for 1815, under the denomination of an improved rental, amounting to 2,750*l.* The contract, he insisted, proceeded upon the faith of the accuracy of these rentals. The actual rent for 1814, however, was 1,965*l.*; and for 1815, 1,758*l.* Therefore, he contended, that he was entitled at least to an abatement in the price, proportional to this deficiency.

Secondly, the exchanged and purchased lands, which formed no part of the ancient family estate, amounted to between three thousand and four thousand acres. As to part of these, an abstract of title had been delivered which was not satisfactory; and with regard to the residue, no abstract had been delivered, or title made.

Thirdly, the commissioners, under an Act passed in the 55th year of George III. for enclosing lands in the manor, within which part of Mr. Johnes' estate lay, had claimed for the King, as lord of the manor, certain sheep walks, containing upwards of fifteen hundred acres, part of the estates which Mr. Claughton had contracted to purchase.

Mr. Claughton admitted, that he had expressed himself satisfied with the title; stating, however, that he had done so only under the impression that the abstract first submitted to him contained the title to all the estates which were the subject of the contract. He admitted also that he had exercised various acts of ownership, as, receiving rents, being in the mansion-house, letting farms; and that, in autumn, 1816, he advertised the property for sale. But he alleged, that all these acts were

done before he was aware of the objections to the title, and of the misrepresentations made to him; and that after that discovery, which did not take place till November, 1817, his interference with the premises had been only such as was necessary to prevent them from falling into ruin.

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Some other circumstances, material to the case, will be found stated in his Honour's judgment.

*Mr. Hart and Mr. Simpkinson* argued for the plaintiffs.

*Mr. Sugden*, for the defendant :

The plaintiffs contended that they ought to have an immediate decree for specific performance, without any reference as to the title, inasmuch as Claughton had waived all objections, and bound himself, both by his declarations and conduct, to accept the title, such as it was.

The defendant, on the other hand, insisted that, even if he could not be relieved from the contract altogether, the plaintiffs were bound to make him a perfect title.

#### THE VICE-CHANCELLOR :

In this case it is necessary to enter into the consideration of the cross bill first. In that bill Claughton alleges, that having, in May, 1814, entered into an agreement with Mr. Johnes for the purchase of the estates in question, it was \*afterwards represented to him that that agreement was made in a form and under circumstances which rendered it impossible that it should be carried into execution, and that he was prevailed upon by these representations to enter into the second agreement. Claughton then says, that, as an inducement to him to enter into the second agreement, a promise was made to him, that 5,000*l.*, part of the consideration money, which by the first agreement was to have been paid to Johnes, should be deducted from the price; that justice was not done him in preparing the agreement, for no provision to that effect was introduced into it; and that the omission took place by the fraud of the other party. This charge, however, was abandoned at the Bar; so that it is unnecessary to take further notice of it.

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Claughton says farther, that, at the time when he entered into the agreement, Johnes misrepresented to him the annual value of the estate both present and prospective—the value as it stood in 1814, and the value as it was to be in 1815; that Johnes caused a paper to be delivered to him, which represented that the annual value in 1814, was 2,138*l.*, and, in 1815, would be 2,750*l.*; and that, in truth, the annual value in the former year was only 1,965*l.*, and in the latter year fell 800*l.* or 900*l.* short of the representation.

With respect to this alleged exaggeration of the rental, it is obvious that the difference of about 200*l.*, in the year 1814, arose from the circumstance that part of the property being unlet, a portion of the rental was an estimated rent, which turned out to be higher than was afterwards produced when the premises were let by auction. That the estimate was too large, is not, however, to be stated as an intentional ground of fraud, and least of all when we consider to whom it was delivered. It was given to Johnson, the surveyor employed by Claughton for the very purpose of inspecting the estate, and advising him as to the propriety of becoming the purchaser.

Besides, it is clear that Claughton did not enter into the contract in confidence upon this representation of annual value. The agreement itself, signed at that time, contains a clause which provides, that, if Johnes should not, during his life, raise the rent up to 2,500*l.* a year, there should, after his death, be a deduction from the purchase-money equivalent to the sum by which the rental should be short of that amount. Now, it is impossible that he could have purchased, in the confidence that the rents would in the next year be 2,750*l.*, when he provides for the event of the rents not being 2,500*l.*

Nor, ought it to be forgotten, that Claughton must have discovered this deficiency the moment he entered into possession of the estate. Yet, in the correspondence during the two years next after Mr. Johnes' death, no complaint as to this matter is brought forward. The objection is plainly an after thought, not founded on fact.

I am of opinion, therefore, that I must dismiss the cross bill, so far as it seeks that the contract may be cancelled; retaining

it however, as to its other parts : and, inasmuch as it contains charges not merely of constructive, but of actual fraud, which have all been either abandoned or not proved, the dismissal must be with costs.

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The next consideration is as to the bill filed by those who now represent Johnes, for the specific performance of the contract dated the 16th of August, 1814. Claughton, in his defence, insists that there can be no immediate decree for specific performance ; that he is not bound to perform the agreement, unless a good title is made to him ; that there is at present a great imputation on the title ; and that he has a right to a reference to see whether a good title to the premises can be made.

On the part of the trustees of Johnes, two answers are given.

First, Claughton, they say, has expressly waived the inquiry into the title ; he has consented to take a conveyance under the general title to the Johnes' family estate. Secondly, he has by his conduct bound himself to take a conveyance, even though no good title can be made.

I. The agreement, dated in August, 1814, provided that an abstract of title should be delivered to Claughton at a particular time mentioned ; that, on the 1st of January, 1815, Claughton should, upon the payment of 20,000*l.* have a conveyance \*made and possession delivered to him of certain specified estates ; and that, in August, 1815, a further conveyance of the residue of the estate should be made to him, subject to the life-interest of Johnes himself. Upon that second conveyance, Claughton was to pay the farther sum of 15,000*l.* The residue of the purchase-money, amounting to 55,000*l.*, was to remain unpaid during the life of Johnes, Claughton in the mean time paying interest on 35,000*l.*, part of that sum. The remaining 20,000*l.* was deemed to be the value of property included in the contract, not in itself productive of income, namely, of the mansion-house and articles in it ; and, therefore, upon this 20,000*l.*, no interest was to be paid. Upon the death of Johnes, Claughton was to enter into possession of the whole estate, and was to pay the remainder of the purchase-money by three instalments.

[ \*116 ]

The abstract was delivered soon after the proper time. It

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CLAUGHTON, <sup>r.</sup> professed to be the abstract of the title of the Johnes' to the ancient family estate of the Johnes' in Cardiganshire. Being returned with remarks by Claughton's conveyancer, it was sent back to Claughton with answers. A conversation then took place between him and Hugh Smith, who acted for the vendors, in which Mr. Smith made a representation to the following effect: "This is in fact the abstract of the title of the ancient family estate of the Johnes': there are, however, certain lands, which were acquired by Mr. Johnes either by exchange or by purchase; but they are of small value, and they will pass well under the general title." Claughton's reply was, "I have no wish to multiply abstracts;" meaning, says Mr. Hugh Smith, "that he was willing to take the general title."

I agree that this is an express waiver of all further enquiry into title, provided the representation, which induced Claughton to make the waiver, is accurately founded in point of fact. The question, then, is, whether the representation, made by Mr. Hugh Smith, was a true and fair representation.

Now, in the first place, Mr. Hugh Smith admits, that he was at the time entirely ignorant of the particulars both of the exchanged and of the purchased lands. He, therefore, was not competent to give Claughton that information, which was to enable him to decide, whether he was to take this property without further information as to the title of the lands which Mr. Johnes had acquired by exchange or purchase. Secondly, Mr. Smith's representation was, that the purchased and exchanged lands were of small value. Now, it turns out, that they amounted to upwards of three thousand acres: and though the whole estate comprised more than thirteen thousand acres, it cannot be contended, that, even in such a purchase, three thousand acres could be fairly described as of little value.

It is not easy to understand what Mr. Smith meant, when he talked of the exchanged and purchased lands passing under the general title. Probably his meaning was, that in the title of the ancient family estate there were general descriptions, large enough to comprehend, under their sweeping expressions, the lands which Mr. Johnes had recently acquired. But, whatever might have been the case with one or two small parcels,

this, it is clear, could not happen to upwards of three thousand acres.

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Under these circumstances, it is impossible that the consent of Claughton to take the general title can bind him. He consented to take the estate without farther enquiry as to title, induced by the representation that the exchanged and purchased lands were of small value, and would pass under the general title. That representation made on the part of the vendor, having been inaccurate, the purchaser cannot be bound by his waiver.

II. But, although there be no express waiver, there may be waiver equally conclusive, arising from the conduct of Claughton himself. For, if a purchaser, put into possession of land, so uses that possession, that his conduct is inconsistent with the relation in which alone he stands to the estate, and changes the nature of the property in a manner inconsistent with that relation, he concludes himself from the opportunity of afterwards objecting to the title. When a purchaser takes upon him to do acts injurious to the property and the owner, these acts fix the property upon him.

Here the points to be considered are, first, what was the relation in which Claughton stood to this property; and, secondly, what are the acts, which, it is insisted, are to have the effect of fixing him with the property.

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Claughton, upon the faith of the representation made by Hugh Smith, consents to take the conveyance upon the general title, and enters forthwith into possession of that part of the estate, of which he was, according to the articles of agreement, entitled to the immediate enjoyment. In April, 1816, Johnes dies. Upon that event, Claughton was entitled to take possession of the remainder of the estate. Communications then ensue between him and Hugh Smith; the treaty proceeds on the footing of the subsisting contract, Claughton being desirous of adding to it some words with respect to the wines, farming stock, and a few other articles not comprised in the original agreement; and it ends in Claughton being put in possession of the whole estate, and in his taking what he calls a qualified possession of Hafod House. But it must be observed, that he was all this time under that impression with respect to the title, which had been produced

JOHNES  
v.  
CLAUGHTON. by the representations of the vendor and his agents. He was acting under the persuasion that a perfect title could be made to him in the manner stated by Hugh Smith—namely, that a good title could be made to the ancient family estate, and that, under the general title to it, the purchased and exchanged lands would pass. It was consistent with this his situation, that he should take possession of the whole estate, and act as if no ultimate difficulty were to interfere with the complete execution of the contract.

In August, 1816, Hugh Smith delivered an abstract of the exchanged lands, though no demand for it seems to have been made by Claughton. In the interval between this time and the December following, Mr. Smith urged Claughton to complete the contract; and, for that purpose, he caused a deed to be delivered to him by which the agreement was to be finally executed, and a security given on the estate for the payment of the instalments. Such being the state of circumstances, Claughton, on the 5th of December, 1816, wrote a letter, which the plaintiff has with great reason relied upon as extremely material. It shows, undoubtedly, that, down to that time, Claughton had no idea of framing any objections to the fulfilment of the contract on the ground of any defect of title to the exchanged or purchased lands. The question, however, still remains—whether he was then fully informed of the particulars as to the lands; for his expression of readiness to accept a conveyance and pay the purchase-money, if it were the result of erroneous impressions excited by the other party, will not bind him.

Mr. Smith had assured Claughton, that the purchased and exchanged lands were of small value, and would pass under the general title. This assurance, so far as it related to the exchanged lands, was corrected in August, 1816, when Smith furnished Claughton with an abstract of the exchanged lands. It is not pretended that any information concerning the purchased lands had been supplied at the time of the alleged acceptance of the title. Smith in his answer to the cross-bill states, that, after Claughton had declined, in November, 1817, to complete the contract, he sent him an abstract of the title to the purchased

lands, and that he refused to accept it. That is an admission, that he had not sent an abstract of those lands at any earlier period. Giving, therefore, to the plaintiffs the utmost possible effect of what they have established upon this part of the case, it amounts merely to this—that Claughton, being satisfied with the title to the ancient family estate, and with that of the exchanged lands, and being ready to take both under the general title, remains altogether in the dark with respect to the newly purchased lands, and so remaining gives this assurance, that he was ready to complete his contract. But can an assurance, given under such circumstances, be binding? The purchased lands turn out to be very different from matters of small value; it cannot be pretended that the assurance was given with full knowledge of the true state of the case, so far as those lands were concerned; and it is even manifest, that Hugh Smith himself could not then have given the requisite information with respect to them. An assurance so given cannot bind the defendant.

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Claughton's case does not stop here. In the fifty-fifth year of his late Majesty, an Act passed for surveying and enclosing certain lands, comprising a part of this estate. Commissioners were appointed to investigate the rights of the Crown (for the manor belonged to his Majesty); and in 1817, these Commissioners claim, as being the property of the Crown, 1,500 acres, which, by the agreement, was to be conveyed to the purchaser by Johnes. Now let us suppose, that in December, 1816, Claughton, having been apprised of all the particulars with respect both to the purchased and the exchanged lands, had unequivocally accepted the title, and that afterwards this claim is made on the part of the Crown; would a court of equity bind the purchaser by his acceptance of the title under perfect ignorance of a claim which had not any pre-existence? My opinion is, that, even if the title had been unequivocally accepted, a new claim having been subsequently made, of which the abstract could not take any notice, that new claim is alone an objection, upon which the purchaser would be entitled to take the opinion of the Master, whether a good title could be made. Claughton, therefore, is clearly entitled to a reference in respect of this claim of the Crown.

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v.  
CLAUGHTON.

A good deal of light is thrown on the alleged acceptance of the title by what subsequently passed between the parties. In November, 1817, Claughton wrote a letter to Hugh Smith, which contained all his objections to carrying that agreement into execution; and he made an alternative proposition, either that he would retire from the contract altogether, or that he would refer the matter to two conveyancers and abide by their decision. Now, is the answer of Mr. Smith such as would have been given by a person, who considered Claughton as having bound himself to accept the title. If such had been his conviction, he would have said,—“I cannot enter into the consideration of your objections; all that you have mentioned is quite immaterial; whatever difficulties may exist, you have bound yourself to complete the contract.” The answer, which Mr. Smith returned, is in a very different spirit. He endeavours to meet the objections by insisting on the long possession of Mr. Johnes and his many acts of ownership; and he declines the proposal of a reference as not being, to use his own words, “within the scope of his trust.” At that time Mr. Smith had all the facts and circumstances of the case fresh in his recollection; and such was the impression which the subject then made on his mind. He resisted a reference, because it was not within the scope of his trust, and not upon the ground, that Claughton was bound to complete his contract without reference to the difficulties which he interposed. His answer was not the letter of a person who believed that Claughton was bound to accept of any title.

It is not necessary to advert particularly to the acts of ownership on which the plaintiffs have placed so much reliance; and the reason why those acts of ownership will not preclude the defendant from objecting to the title, is to be found in the very nature of the transaction. Upon the death of Johnes, Claughton, according to the conditions of the purchase, entered into possession, under a full persuasion that the ultimate conclusion of the agreement was about to take place, and entertaining no suspicion of the existence of any difficulty which could prevent the intended agreement from being effectuated. Considering himself as entitled to treat this estate as the unqualified owner of it, he could scarcely act otherwise than he did; all the acts insisted upon are acts

which arose naturally from that possession, accompanied with the persuasion under which possession was taken. It was of course, that he should take the measures which were necessary for the management of the property. Every thing that he did is referable to his entire confidence (and that confidence, the agreement itself and the representations of the parties, warranted him in entertaining), that he was on the eve of becoming complete master of the estate.

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CLAUGHTON.

The steps which he took towards selling the property are to be viewed in the same light. It is obvious that he made the purchase originally with a view to a resale. Therefore, that he should make dispositions for the purpose of a sale, flowed out of the relation in which he considered himself to stand towards the estate. The \*advertisements for sale, which he caused to be inserted in the newspapers, were perfectly consistent with that relation and with his impressions concerning it; and though some of those advertisements appeared after the letter dated in November, 1817, (the letter detailing his objections), yet it appears that the insertion then was the consequence of instructions prior to that letter.

[ \*119 ]

Considering then all the circumstances under which Claughton's assurances were given and his acts done—representations originally made to him that the purchased and exchanged lands were of small value—no information given to him afterwards with respect to the purchased lands—claims, the existence of which was not known, subsequently advanced on the part of the crown;—looking thus at the subject in all its extent, it is impossible to arrive at the conclusion, that the defendant has so conducted himself as to be bound to complete this contract, and to accept such title, whether perfect or not, as the vendor has.

He is, therefore, entitled to a reference.

His Honour expressed his opinion, that the reference ought to be limited to objections not appearing upon the abstract which had been delivered.



1824.  
Mar. 12.

LEACH, V.-C.  
[ 119 ]

## BAXTER v. PLENDERLEATH.

(2 L. J. Ch. 119—120.)

Construction of articles of partnership with respect to the power of dissolution.

The general right which every member of a partnership has to dissolve the partnership will not be controlled except by clear expressions.

That right will not be controlled by the partners taking a lease for years of the premises on which the trade is to be carried on :

Nor by provisions in the articles as to the amount of capital to be brought in by the several partners in successive years :

Nor by provision for the event, where the partners are in number more than two, of the exclusion of one of them by the others.

THE bill was filed by Baxter against his partners, Hudson and Plenderleath, praying a dissolution of the partnership, an injunction, and a receiver.

An injunction having been obtained, the plaintiff now moved that a receiver should be appointed.

This was met by a cross-motion, that the injunction should be dissolved.

*Mr. Heald* and *Mr. Jacob* appeared for the plaintiff.

*Mr. Wetherell* and *Mr. Treslove*, for the defendant Plenderleath.

*Mr. Horne*, for Hudson.

The plaintiff had endeavoured to make out a case of misconduct against the defendants ; but failing to do so, he insisted, that, as the articles of partnership did not fix the duration of the partnership, he had a right to dissolve it when he pleased, and of consequence, to have a receiver appointed.

On the other side it was contended, that, though the articles did not define the number of years for which the partnership was to last, they nevertheless contained provisions which showed that it was not to be dissoluble at the pleasure of any single partner. One clause prescribed the amount of capital which Hudson was to bring into the concern every year, until he should

have as much money invested in it as Baxter had. If one partner was excluded by the others, he was to receive 300*l.*; and there was provision made for what was to be done, in the event of its being thought advisable to dissolve the partnership. Besides, the partners had agreed to take a seven years' lease of the premises on which the trade was carried on. It was evident, therefore, that it never was the intention of the parties, that the partnership should be dissoluble at the pleasure of any single member of it.

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v.  
PLENDER-  
LEATH.

THE VICE-CHANCELLOR :

The appointment of a receiver must depend wholly on the question, whether Baxter had or had not the power of dissolving the partnership? For if he had such a power, it is clear that the other partners cannot now be allowed to collect the partnership effects.

The articles of partnership in this case are not without some difficulty in their construction. The first point made on behalf of the defendants is, that the parties agreed to take a lease of premises for the \*partnership concern for seven years; and, therefore, it is said, they contemplated a partnership for seven years. It has, however, been decided, that unless there be something else in the case, the mere taking of premises for a term of years, is not evidence that the contract of the parties was that they should continue partners for the same term.

[ \*120 ]

It is further argued, that these gentlemen must have intended to continue partners for a period of years, because, by the articles, Hudson is to bring into the trade a sum of 300*l.* in the first year, and a certain sum in every following year, till he shall have contributed to the capital as much as Baxter. And, no doubt, such a provision proves, that they contemplated the possibility or the probability of remaining partners for a term of years; but the contemplation of a possibility does not amount to an engagement.

There is afterwards a provision, that if one of the partners is excluded, (where there are three partners, one of them† may exclude the third), he shall receive 300*l.*; and arrangements are made with respect to the distribution of the property, in case

† *Sic.*

BAXTER  
v.  
PLENDER-  
LEATH.

"the concern should prove unfortunate, and it should be deemed advisable to put an end to the partnership." Will these words control the general right of a partner, when it is not limited by express stipulation, to dissolve the partnership at his pleasure? If they are consistent with that general right, the Court must not strain them, in order to limit it. To control the general right, clear and unequivocal words must be used. But here every expression is consistent with the general right; and, therefore, I am of opinion, that under these articles Baxter continued invested with the right to dissolve the partnership at his pleasure. Having that right, he has exercised it; and it is not fit, with reference to the relative interest of the parties, in the partnership property, to permit Hudson and Plenderleath to possess themselves of effects which they may waste to the prejudice of Baxter. A receiver must be granted.

1824.

LEACH, V.-C.

[ 137 ]

# JOHNSON v. WARD.†

(2 L. J. Ch. 137.)

An administrator in India, being a creditor of the intestate by specialty, and also by simple contract, possesses himself of assets not sufficient to discharge the two debts which are due to him, and claims against the assets possessed by another administrator in England: Held, that his right of retainer must be exercised in satisfaction of the specialty debt, and that he will rank only as a simple contract creditor upon the assets in England.

LIEUTENANT MUNRO died in India, leaving some property there, and also possessed of stock in the English funds. Messrs. Arbuthnot & Co. took out administration to him in India. The brother of the intestate took out administration to him here, and got possession of such of the assets as were in England. The assets in India were collected by Messrs. Arbuthnot & Co., and amounted to 801*l.* 6*s.* 8*d.*

Mr. Munro, having borrowed considerable sums from Messrs. Arbuthnot & Co., executed, while he was under age, a bond as a security to them for repayment; but after he attained twenty-one, he made payments on account of this bond, and did other acts confirmatory of the sums due from him to

† *Wilson v. Coxwell* (1883) 23 Ch. D. 164.

Messrs. Arbuthnot & Co. In respect of this debt, they had been reported to be simple contract creditors.

JOHNSON  
C.  
WARD.

They had also another debt from him, which was secured by a valid bond.

The Master, allowing their right of retainer, had deducted the sum in their hands from the amount of the valid bond; thus leaving them, in respect of their other debt, to come in, *pari passu* with other simple contract creditors, against the assets in England.

On the other hand, Messrs. Arbuthnot & Co. insisted, that they were entitled to retain the assets in their hands in satisfaction of their simple contract debt, and to rank as specialty creditors upon the assets here, in respect of the valid bond.

The question was simply, whether the right of retainer was to be exercised in satisfaction of the specialty debt or of the simple contract debt?

*Mr. Bell* and *Mr. Pemberton* appeared for the different parties.

THE VICE-CHANCELLOR :

I must treat Messrs. Arbuthnot's right of retainer in their capacity of administrators, as I would have treated their right of payment, if they had been strangers to Lieutenant Munro's estate. If a stranger were a creditor for one sum by simple contract, and for another sum by specialty, could the personal representative apply monies in his hand in satisfaction of the simple contract debt of him who was also a specialty creditor? That would not be a due administration of the assets. Messrs. Arbuthnot must exercise their right of retainer in satisfaction of the specialty debt.

The decree, after directing payment of the specialty debt, ordered, "that the simple contract creditors of the testator, Edward Stracey Munro, including the said George Arbuthnot in respect of his said bond, dated the 16th day of November, 1808, &c., be paid what the Master shall find due to such simple contract creditors respectively."

## IN THE MATTER OF GOODCHILDS AND Co.†

1824.

Jan. 24.

Lord  
ELDON, L.C.

[ 137 ]

(2 L. J. Ch. 137—139; S. C. nom. *Ex parte Sillitoe*, 1 Gl. & J. 374.)

Seven partners carried on a bank in Durham, and also in London, where the two managing partners also carried on a separate trade as ironmongers; monies were from time to time raised for the banking firm, by the indorsements of the partnership of two; and a commission of bankrupt having issued against all the seven, it was found that a large sum was due from the banking firm to the partnership of two.

Held, that that sum could not be proved by the partnership of two, against the estate of the banking firm, because it was not a \*debt arising from dealings in those articles which were the subject of the separate trade.

[ \*138 ]

The test is whether there is a transaction between trade and trade.

Two gentlemen of the name of Goodchild, John Jackson, William Jackson, and three other individuals, constituted a partnership which carried on the business of bankers, in the county of Durham, under the firm of Jacksons, Goodchild & Co., and in London under the firm of Goodchilds, Jackson & Co. The country firm was in the habit, on the one hand, of drawing bills of exchange to a large amount upon the London firm, and on the other hand, of remitting to that firm drafts and bills of exchange for the purpose of enabling them to meet the bills drawn upon them. In the accounts of the two firms, the London firm was credited with all the bills and drafts drawn upon them, and debited with the full amount of the remittances.

John Jackson and William Jackson were the managing partners in London, where they also carried on a separate trade as ironmongers. The credit of the ironmongery firm had been made subservient to the purposes of the banking establishments in two ways. First, in order that the bills remitted by the country bank might be made immediately productive, the firm of John and William Jackson was in the habit of indorsing them, so as to get them discounted; secondly, they were in the habit of drawing bills of exchange upon various firms and individuals, and of procuring them to be discounted. The money raised in these two ways was handed over to the banking concern. No other dealings took place between either of the banking firms and the separate firm of John and William Jackson.

† *Ex parte Maude* (1867) L. R. 2 Ch. 550, 554.

A commission of bankrupt having issued against all the partners, it appeared, that a sum of 8,220*l.* was due from the banking firm to the separate firm of John and William Jackson, arising out of that course of proceeding for procuring bills to be discounted, which has been mentioned.

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GOODCHILDS  
AND Co.

For this sum, the firm of John and William Jackson claimed to prove against the banking concern.

The VICE-CHANCELLOR had made an order directing the proof to be admitted.

Against his decision, the assignees of the bank appealed to the Lord Chancellor.

*Mr. Montague* appeared to oppose the proof.

*Mr. Hart* and *Mr. Shadwell*, *contra*.

For the assignees of the banking concern it was said that the principle on which the VICE-CHANCELLOR had proceeded, was, that if three or more persons constituted one partnership, and if some of these partners constituted also a distinct partnership, carrying on a distinct business, then, if such dealings took place between the two partnerships, either by the loan of money, or by the sale of goods, that the larger partnership became indebted to the minor partnership, the latter was entitled to prove against the former. Now, that doctrine was erroneous, so far as it confounded debts arising from the sale of goods, with debts arising from the mere loan of money. If the partnership of John and William Jackson had supplied goods to Goodchilds, Jackson & Co. they might have proved for the debt so accrued due. But all that had been done here was, that money had been raised for the use of the larger partnership by means of the credit of the minor partnership; in other words, the minor partnership had borrowed money, and lent it to the larger partnership. If John Jackson had alone furnished this aid to the bank, could he have been allowed to prove? Clearly not. If John Jackson and William Jackson, not constituting a distinct firm, had concurred in making these loans, it was equally clear that they could not have proved. What difference then did it make that these two gentlemen were partners in

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GOODCHILDS  
AND CO.

the ironmongery trade, and that it was by means of the credit of that partnership that the advances to the bank were made? The case would have been altogether different, if the debt had arisen from dealings between the bank and the firm of the Jacksons, in those matters and commodities which were the subject and business of the minor partnership.

Here were cited the cases of *Ex parte St. Barbe*,† and *Ex parte Hesham*.‡

[ \*139 ] On the other hand, it was said that it was admitted on all hands that the monies \*advanced to the bank had been raised, not by the individual credit of John Jackson and William Jackson, but on the credit of their partnership in the iron trade. If that partnership had furnished goods to the banking partnership, it was clear that they would have been entitled to prove against the bank. Then, where was the substantial difference between a supply of goods belonging to the minor partnership, and a supply of money procured on the credit of that partnership, and for which all its property and capital were responsible?

The LORD CHANCELLOR, after considering the subject repeatedly, and examining the orders which had been made in cases where one or some of many partners had been admitted to prove against the estate of the more numerous partnership, stated, that all these were cases in which the partner or partners claiming to prove, had not only carried on a separate trade, but had supplied the aggregate partnership with the articles of their separate trade, and had thereby become its creditors, and that in no case had any partner or partners been admitted to prove to the prejudice of the joint creditors, when his or their claim arose merely out of money advanced by him or them for the use of the larger partnership. The consequence therefore was, that the order of the VICE-CHANCELLOR must be discharged. It was the general principle of the Court, that partners shall not prove against their own firm. From this principle there were two exceptions:—the one, where the separate property of a partner

† 8 R. R. 196; (11 Vesey, 413).

‡ 1 Rose, 146.

was fraudulently and improperly applied for the purposes of the company; the other, where one or some of the partners carried on a distinct trade, and by reason of dealings in that trade became creditors of the aggregate firm. The question then always must be—What shall be a dealing in that distinct trade? If one partner, who has a separate trade of his own, lends money to a numerous partnership, of which he is a member, the fact of his being a separate trader, would not entitle him to prove against the firm. Must not the same rule hold, if the money is advanced, not by one of many partners who is trading separately, but by two out of many partners, which two carry on a separate trade. The principle of the exception is not that the partner who is admitted to prove against his own firm is a separate trader, but that he is a separate trader, who, by dealings in that separate trade, has become a creditor of the firm, in which he is also a partner. Here the claim of the Jacksons did not arise from any dealings in their ironmongery business.

In re  
GOODCHILD'S  
AND CO.

# EX PARTE ALEXANDERS, IN THE MATTER OF TILLS.

(2 L. J. Ch. 159—161; S. C. 1 Gl. & J. 409.)

Deeds are deposited with a firm of five partners, one of whom was a nominal partner, as a collateral security for advances by the firm, which are secured by bond; the nominal partner being dead, it is agreed that the four surviving partners shall hold the deeds as a collateral security for sums secured by a second bond, in addition to the former bond: Held, that under this agreement, the partnership of four has an equitable lien on the estates comprised in the deeds, to the extent of the sums due on both bonds.

1824.  
*April* 12, 28.  
LEACH, V.-C.  
1826.  
Nov. 22.  
Lord  
LYNDHURST,  
L. C.  
[ 159 ]

IN and for some years previous to November, 1816, Dykes Alexander, Samuel Alexander, the younger, Richard Dykes Alexander, and Henry Alexander, carried on the business of bankers, under the firm of Alexander, Spooner and Alexander. \*John Spooner, whose name appeared in the firm, had formerly been a partner, but had in fact withdrawn about ten years previously.

[ \*160 ]

In November, 1816, W. Tills deposited with the bank the title-deeds of certain real estates; and at the same time executed to



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ALEX-  
ANDERS.

the four Alexanders and Spooner, a bond in the penalty of 4,000*l.*, conditioned for the payment to them of any balance of account which might thereafter be due from him to them, not exceeding 2,000*l.* and interest. Upon the bond there was indorsed a memorandum signed by him, expressing that he had that day left with Dykes Alexander, Samuel Alexander, the younger, John Spooner, Richard Dykes Alexander, and Henry Alexander, the title-deeds of certain premises, situate in Hutton, in the county of Suffolk, which deeds he thereby pledged as a collateral security for the due payment of the within obligation; and he thereby authorized Dykes Alexander, Samuel Alexander, John Spooner, Richard Dykes Alexander, and Henry Alexander, to stand possessed thereof, until the full payment or discharge of all moneys due to them, or that might thereafter be due to them. as expressed by the within obligation.

Spooner died in June, 1819.

In May, 1821, Tills executed a bond to the four Alexanders, conditioned for the payment of any balance of account not exceeding 1,000*l.* and interest, which was or might become due from him to them. Upon this bond there was indorsed the following memorandum signed by Tills:—"I hereby acknowledge the writings on my estate, situate in Hutton, to be left as a collateral security with D. Alexander, S. Alexander, the younger, R. D. Alexander, and H. Alexander for the payment of 1,000*l.* mentioned in this bond, in addition to a bond bearing date the 2nd day of November, 1816, for 4,000*l.*"

At the time of Spooner's death, the balance due from Tills to the firm was 2,998 19*s.* After the death of Spooner, and up to the date of the second memorandum, he paid in at different times sums amounting in all to 3,360*l.* 3*s.* 6*d.*; but he drew out, during the same period, sums to a greater amount. In 1822 he became a bankrupt, and the balance then due from him exceeded 3,000*l.*

Messrs. Alexander now insisted that they were equitable mortgagees of the property comprised in the title-deeds deposited with them, to the extent of 3,000*l.* and interest; and by their petition they prayed that the premises might be sold and the proceeds applied in satisfaction of the debt due to them.

On the other hand, the assignees of the bankrupt contended that the equitable security of the petitioners was limited to the 1,000*l.* mentioned in the second bond.

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ALEX-  
ANDERS.

*Mr. Montague* appeared in support of the petition.

*Mr. Bell* and *Mr. Rose* for the assignees.

It was contended, on behalf of the assignees, that a change in the partnership having taken place on the death of Spooner, the subsequent payments by Tills had completely extinguished the debt due to the firm in which Spooner's name appeared.

\* \* \*

For the petitioners, it was insisted that the circumstance of Spooner being only a nominal partner constituted a material difference, which excluded the application of the principles on which the assignees relied. \* \* \*

#### THE VICE-CHANCELLOR:

The facts of this case are shortly these. In 1816, the bankrupt Tills enters into a bond for securing to four gentlemen of the name of Alexander, and to Spooner, which five individuals constituted a banking firm, all sums which were, or might thereafter be, due from him to the bank, to the extent of 4,000*l.* and interest. On the back of the bond there is an agreement, that the title-deeds of certain premises deposited with these five persons should be a collateral security with the bond. In 1821, Spooner being then dead, the same bankrupt enters into a second bond to the four Alexanders, for securing to them all sums due, or which might become due, from him to them, not exceeding 1,000*l.* and interest; and upon this bond there is an endorsement, that the same title-deeds are to be a collateral security for that sum of 1,000*l.* in addition to the former bond.

[ 161 ]

The four Alexanders, thus carrying on business at the time of Tills' bankruptcy, claim a lien on these title-deeds for the amount of the general balance due to them from Tills.

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ALEX-  
ANDERS.

The argument against their claim is the following:—The bond to the five is to be considered as discharged, for Spooner having died in 1819, the bankrupt continues his dealings with the four Alexanders, and the payments made by him to them are (on the authority of *Clayton's* case,†) to be first applied in discharge of the bond to the five; so that the first bond will be wholly satisfied, and the only claim of the bankers will be on the second bond.

It is not denied that such would be the result, provided that Spooner had been substantially a partner; but it is said that, in truth, he was only a nominal partner, and that, therefore, *Clayton's* case has no application here, because the doctrine of that case was founded on an equity to be applied between the surviving partners, and a deceased substantial partner.

It appears to me that this question does not arise here. The first deposit of the title-deeds can be treated only as a security collateral to the bond. The words in the first memorandum, “which deeds I do hereby pledge as a collateral security for the due payment of the within obligation,” show that the estate is to be a collateral security for all monies due from the bankrupt under the bond. Then the indorsement on the bond of 1821 states “that the deeds are to be left as a collateral security with the Alexanders for the payment of the 1,000*l.* mentioned in this bond, in addition to the former bond.” In other words, the deeds are to be a security to the four Alexanders for advances to the extent of 1,000*l.* and interest, in addition to their being a security to the extent of 2,000*l.* for advances made, or to be made, according to the intention of a former obligation. Here, then, we have an express agreement, that the four Alexanders shall have the benefit of this deposit, as well for the sum of 2,000*l.* as for the sum of 1,000*l.*; \*and it becomes unnecessary to enter into the general question which was discussed in the argument. [This order was affirmed by Lord LYNDBURST, L. C., on appeal, Nov. 22, 1826: see 2 Gl. & J. 275, 276.]

[ \*162 ]

† 15 R. R. 151, 161 (1 Mer. 530, 572).

## EX PARTE LLOYD, IN THE MATTER OF ABLETT.

(2 L. J. Ch. 162; S.C. 1 Gl. &amp; J. 389.)

1824.  
 April 1, 6.  
 LEACH, V.-C.  
 [ 162 ]

Title-deeds are deposited with a partnership upon an agreement by parol, that they shall be a security for future advances, and a change of partners afterwards takes place : the security may be extended by parol to future advances by the new partners.

THE bankrupt Ablett had deposited the title-deeds of certain property with his bankers, who were the present petitioners, and their then partner William Jones; and it was verbally agreed that they should hold them as a security for all advances which they should make to him. William Jones afterwards died, upon which occasion it was further agreed that the surviving partners should still hold the deeds as a security for the balance which might at any future time be due from him to them. About sixteen months afterwards, Ablett became a bankrupt. He was then largely indebted to the petitioners, but no part of the balance then due from him to them had been a subsisting debt at the time of the death of William Jones.

The petitioners now insisted that they were equitable mortgagees of the property comprised in the deeds deposited with them; and they prayed that it might be sold, and the proceeds applied in discharge of their debt.

The only question was, whether, if title-deeds are once deposited as a security for certain advances, the extent of the security can be subsequently varied or increased by parol agreement.

*Mr. Sugden* and *Mr. Parker* appeared for the petition :

They relied on the authority of *Ex parte Kensington*.†

*Mr. Cullen*, *contra* :

He admitted that if the agreement, originally made when the deeds were deposited, had provided that they should be a security, even after a change of partners, for the balance due, that would have given the petitioners a good title as equitable mortgagees. But as that had not been done, he insisted that the doctrine now contended for, amounted in fact to this : that

† 13 R. R. 32 (2 V. & B. 79).

Ex parte  
LLOYD.

a deposit of title-deeds with one partnership, as a security for their balance, might be converted by parole, unaccompanied by any acts, unevicenced by any writing, into a security to another partnership for their balance. In other words, an equitable mortgage of real estate might be created by parole alone.

THE VICE-CHANCELLOR :

I abstained from deciding this case at the time of the argument, only that I might have an opportunity of satisfying myself that I was not carrying the doctrine of equitable mortgages beyond the limits of former decisions. There was no doubt that an agreement by deed could not be extended by parole; on the other hand, a parole agreement might be extended by parole. Now, a written agreement, not by deed, is in law nothing more than a parole agreement. Upon principle, therefore, a written agreement that deeds deposited with a banker shall be held as a security for his advances, may be extended by parole, and the case of *Ex parte Kensington* is an express authority that a deposit by a written agreement may be extended by parole.

The present case is free from all doubt, for here the original agreement was merely by parole.

*The prayer of the petition was granted.*

1824.

April.

LEACH, V.-C.

JOHNSON v. BURSLEM.

(2 L. J. Ch. 168—170.)

Possession by one tenant in common does not necessarily amount to ouster of another.

\* \* \* \*

[ 169 ] THE VICE-CHANCELLOR :

The bill states this plaintiff to have been the husband of a lady, who, upon the death of her father in 1802, became entitled as tenant in common of a moiety of certain estates. The other moiety went to her sister the wife of Nathaniel Burslem. This Burslem, at the death of Robert Brooke, the father, was in possession as purchaser of that gentleman's life interest, and he has continued in possession ever since.

At the time of Robert Brooke's death, the plaintiff and his wife were abroad, being both of them ignorant of the existence of the testator's will, and of her rights under it. They continued abroad, and in this state of ignorance, during the whole of her life; and it was not till his return to this country in 1822 that he learned that his wife had in 1802 become tenant in common with Mrs. Burslem of the property in question, and he \*immediately applied for payment. Burslem pretended that the plaintiff's deceased wife was not legitimate. However, negotiations followed, but these negotiations turned out to be without effect.

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v.  
BURSLEM.

[ \*170 ]

Then the question is, not whether a decree is to be made in favour of the plaintiff, but whether he is entitled to call upon the defendants to answer; and that depends upon this point, whether, supposing his wife to have been tenant in common with Mrs. Burslem under the circumstances stated in the bill, he is entitled to make Mr. and Mrs. Burslem account here for his wife's moiety of the rents and profits. *Primâ facie*, a court of equity gives that relief to a tenant in common; and in doing so it has a concurrent jurisdiction with that which a court of law exercises upon an action of account. But it is said that, as here a court of equity has only a concurrent jurisdiction, if the case be such, that the plaintiff could not in a court of law sustain an action of account, he cannot support his bill in a court of equity. Now this plaintiff, the defendants go on to say, states facts which amount to an actual ouster of his deceased wife from her tenancy in common; where there has been an actual ouster, the tenant in common must recover possession at law, before he can have an action of account; in this case, therefore, the plaintiff could not have an action of account at law, and consequently he cannot have that account upon bill.

The important consideration then is—Do the facts stated upon the bill amount to an ouster of the wife from her tenancy in common?

When the tenancy in common accrued in possession, the lady and her husband were abroad; they remained, during the whole of her life, ignorant of their rights, and never made any claim upon Mr. or Mrs. Burslem. Now, actual ouster is, properly

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 v.  
 BURSLEM.

speaking, the deprivation of the possession by force and violence. It may be presumed, even where no violence has been used; but there must be a demand, there must be a denial of the right by him whose possession is to be presumed to be an ouster. Here the possession of the defendants was under circumstances in which the other tenant in common was altogether ignorant of her rights. My opinion therefore is that the bill does not state a case of ouster. Mere possession is not ouster, though it is a ground upon which a jury may presume ouster. If there be a demand or submission to demand, without actual violence, that is equivalent to ouster. But here there was neither demand, nor submission to demand, nor violence. If the facts as stated in the bill, were proved on a trial at law, I could not direct the jury to presume actual ouster.

The bill, therefore, states a case which must compel the defendants to answer.

*The demurrer was overruled.*

1824.  
 June.

LEACH, V.-C.  
 [ 178 ]

## DEWAR v. ELLIOTT.†

(2 L. J. Ch. 178.)

A court of equity will not enforce an agreement against a party, who was induced to enter into it, in order to save his sons from a threatened prosecution for felony.

MR. DEWAR and Mr. Elliott had been in partnership as coach-harness makers. Considerable losses had been sustained, and an agreement was entered into between the partners, that their partnership should be dissolved on certain specified terms. These terms were very disadvantageous to Elliott; for one of them was, that Dewar was to receive back all the money which he had brought into the business, without bearing any share of the losses.

Mr. Elliott had subsequently refused to fulfil this agreement; and accordingly, the bill was filed by Mr. Dewar, for a dissolution of the partnership, and a specific performance of the agreement.

† *Williams v. Bayley* (1866), L. R. 1 H. L. 200, 35 L. J. Ch. 717.

Elliott, by his answer, did not deny the agreement; but he stated, that he had been induced to enter into it by Dewar's threats, that he would prosecute his two sons for felony; and his assurances, that he would abstain from prosecuting them, if he, the father, would accede to a dissolution of the partnership on the disadvantageous terms which were proposed to him.

DEWAR  
v.  
ELLIOTT.

One of the witnesses proved, that he was employed on the part of the defendant, to negotiate the terms of the dissolution; and that in that negotiation, Dewar stated that it was his intention to prosecute the defendant's sons for felony, but that he would drop the prosecution if the money which he brought into the partnership were returned to him.

*Mr. Pemberton* and *Mr. Skirrow* appeared for the respective parties.

THE VICE-CHANCELLOR :

The agreement for the dissolution, and the agreement with respect to the terms of that dissolution, are one agreement. I am of opinion that Elliott was induced to enter into that agreement by the intimidation and duress of the threats to prosecute his sons for felony.

The bill, therefore, must be dismissed; but, considering the whole of the case, without costs.



1824.

Nov. 13.

LEACH, V.-C.

[ 15 ]

## WEST v. WILD.

(3 L. J. Ch. 15—17.)

Specific performance, indemnity, costs.

Executors sell by auction, in nine lots, sundry houses, which the testator during his life held by lease under the Crown, and of which they, after his death, obtained a new lease, subject to one entire rent of 243*l.*; the printed particulars mention that the sale is by executors, and that the nine lots are all held under one lease, and at one entire reserved rent: Decreed, upon a bill filed by the vendors, and an answer, submitting to perform the contract upon an indemnity being given, that the purchaser of one lot, with respect to which the particulars stated that the apportioned rent for it was 52*l.*, was entitled to have an indemnity from the executors against his liability for the whole reserved rent, and the breach of any of the covenants in the original lease.

[ \*16 ]

In such a case the defendant is entitled to have his costs, up to and including the hearing.

SIR ELIJAH IMPEY having been, at the time of his death, possessed of a lease from the Crown, of sundry houses for a term of years, which would expire in the month of February, 1815, his executors, Mr. West and Mr. Lichfield, applied to the Crown to grant a new lease of the premises. Accordingly by an indenture dated the 24th of August, 1810, and made between his late Majesty of the one part, and Mr. West and Mr. Lichfield (who were therein described as the executors of Sir E. Impey,) of the other part; his Majesty demised to West and Lichfield, their executors, administrators and assigns, the messuages therein described, to hold the same, from the 27th day of February, 1815, when a former lease thereof would expire, for the term of 225 days and 52 years, at a yearly rent (during the 52 years) of 268*l.* 13*s.* This lease contained the usual covenants on the part of the lessees; and upon breach of any of covenants, the Crown might re-enter and determine the estate of the lessee.

West and Lichfield subsequently reassigned one of the houses to the Crown; and the rent of 268*l.* 13*s.* was thereupon reduced to 248*l.* 13*s.*

In November, 1821, the executors sold these leasehold premises by public auction, in nine lots. In the printed particulars the sale was stated to be by order of the executors of Sir Elijah Impey; and the nine lots were described as held under one

lease from the Crown, at a rent of 243*l.* 13*s.* per annum. Lot 4 was stated to consist of two houses; and the description of this lot in the particulars concluded with these words: "The apportioned rent for these houses per annum, 52*l.*" One of the conditions of sale provided, that the purchasers, on payment of their purchase-money respectively, "should have leases of their respective lots, at their own expense, from the executors, with the like covenants and conditions contained in the original lease."

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v.  
WILD.

At the sale, James Wild was declared the purchaser of lot 4, at the price of 1,255*l.*, paid the deposit, and signed an agreement for the payment of the remainder of the purchase-money.

Afterwards, when the draft of the lease from the executors to him was prepared, two difficulties arose. The purchaser objected in the first place, that what he had bought was to be subject only to an apportioned rent of 52*l.*; and therefore, inasmuch as the Crown might come upon the lessee of that part of the premises, for the entire reserved rent of 243*l.* 13*s.*, that he was entitled to have an indemnity from the vendors against this liability. In the second place, he said that he would be liable to eviction, if any of the covenants in the original lease were broken, and therefore that he was entitled to have a covenant or an indemnity against the breach of these covenants by the original lessees. The executors refused to comply with either of these demands. They offered to enter into a covenant for the payment of the rent reserved by the Crown; but more than that they would not give.

In the course of the correspondence on the subject, Mr. Wild offered to recede from his demand, if they would make an abatement in the price. "I must indulge a hope," said he, in a letter addressed to the executors, "that you will make me that liberal deduction from the amount, (*i.e.*, of the purchase-money), that will satisfy me with a common covenant, and enable me to give a suitable indemnity to any person who may succeed me on the premises."

The bill was filed by Mr. West, the surviving executor of Sir Elijah Impey, for a specific performance of the contract.

The defendant, by his answer, stated, that he was, and always

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v.  
WILD.

had been, ready and willing to perform the contract, on having a good and sufficient security from the plaintiff to indemnify him in case of his eviction from the premises, by reason of any breach of the covenants in the original lease, and in case also of his being obliged to pay more of the entire rent reserved to the Crown, than the sum of 52*l*.

*Mr. Lovat*, was for the plaintiff.

*Mr. Horne*, for the defendant.

[ \*17 ]

The plaintiff contended, that he was not liable to be called upon for an indemnity, because all that he had done was in his character of executor. It was only as executor that he had any estate or interest in \*the premises sold; it was only as executor that he had sold them, nor had the defendant ever treated with him except as the executor of Sir Elijah Impey. An executor, thus disposing of property which came into his hands in his capacity of personal representative, could not be called upon to incur personal responsibility by giving an indemnity to the purchaser. Here the purchaser had no reason to complain; for he was fully apprised, before he entered into the contract, of the circumstances on which he now founds his objections. He was informed by the particulars of sale, that all the nine lots were held under one lease from the Crown, at one reserved rent, for the whole of which, of course, the Crown might distrain on any one lot; and, as he was aware that he was dealing with a vendor, who was merely an executor, and not entitled beneficially, he never could expect any indemnity. The objection was an after thought, of which he availed himself, in order to try to obtain a diminution of the price which he had bound himself to pay; and, for that reason, it was little entitled to the favourable attention of the Court.

THE VICE-CHANCELLOR :

Suppose this lease had devolved to Mr. West and Mr. Lichfield simply as executors, there might have been some weight in the observations which have been urged on behalf of the plaintiff;

but even on that supposition, the case would not have been concluded; for I know not that any authority has hitherto established, that executors are not bound, when they come forward as vendors, to make as good a title as other vendors.

WEST  
v.  
WILD.

That case, however, is not now before the Court. For this lease did not devolve upon Mr. West and Mr. Lichfield as executors of Sir Elijah Impey; they are themselves the lessees under the Crown; and the mention made of them in the lease as executors of Sir Elijah Impey, is mere description.

It is quite plain, that this defendant is a purchaser upon an agreement for an apportioned rent of 52*l.*, he is therefore to be protected from the payment of any thing beyond that yearly sum of 52*l.*; consequently he is entitled to an indemnity against his liability for the whole of the original rent.

There must be a decree for specific performance on indemnity being given by the vendors to the defendant, against the breach of any covenants in the original lease. The lease and the indemnity must be settled by the Master.

The plaintiff was to pay to the defendant the costs of the suit, up to and including the hearing.

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### MARSHALL v. CAVE.

(3 L. J. Ch. 57.)

1824.  
LEACH, V.-C.  
[ 57 ]

A mortgagee, who has taken possession, will be allowed in his accounts the expense of buildings substituted for decayed old buildings, even though the new erections should be on an improved scale.

A mortgagee of a house, having taken possession of it, will not be charged with an occupation rent for it during a time when it was in so ruinous a state, that rent could not have been obtained for it.

In ascertaining what was due, on the mortgage of a house and the appurtenances, to a mortgagee who had taken possession, the Master had allowed him the costs of some improvements which he had made. The building being in a very dilapidated condition, he had rebuilt the kitchen, pantry, &c.; and he had the house double-roofed, instead of being, as it was before, only single-roofed. The mortgagee had been charged with an occupation rent; and that rent had been estimated with reference

MARSHALL  
v.  
CAVE.

to the increased value of the premises caused by the new erections.

The mortgagor excepted to the report, on the ground, that he ought not to be charged with the sums expended on the premises by the mortgagee.

*Mr. Heald* and *Mr. Roupell* appeared in support of the report.

*Mr. Treslove* appeared in support of the exception.

For the exception it was contended, that a mortgagee had no right to increase the amount of the charge on the property, by expending money upon it without the sanction of the mortgagor. If the property began to fall into a state of dilapidation, which was likely to diminish its value so much that it would not be an adequate security for his money, his remedy was by foreclosure, and not by laying out money in what the mortgagee might conceive to be repairs or improvements, but which the mortgagor might not choose to have made.

For the report it was contended, that the improvements appeared by the finding of the Master to have been substantial and proper, and a mortgagee was justifiable in acting as a provident owner would have done. Nothing would be more injurious to mortgagors, than that a mortgagee should be unable, with safety to himself, to expend money in maintaining the premises in good repair.

THE VICE-CHANCELLOR :

This mortgagee has not made new buildings for new purposes; he has only erected new buildings on the site of the old, and for the same purposes as were served by them. The new buildings are merely substitutions for those which were too ruinous to be any longer useful.

*The exception must be over-ruled.*

The Master had charged the mortgagee with an occupation rent, not from the time when he recovered possession of the

premises, but only from the time when the repairs had been completed.

MARSHALL  
v.  
CAVE.

An exception was taken to the report, on the ground that the occupation rent ought to have been calculated from the date when the mortgagee entered into possession. The mortgagor, it was said, was here charged with interest, during a time when the mortgagee was in possession of the property, and yet was charged with no rent. Was the mortgagee to be allowed, first to occupy the premises gratis, and then to charge interest?

On the other hand, it was answered, that the finding of the Master showed, that, at the time when the mortgagee recovered possession, the premises were in so ruinous a state, that no rent could have been gotten for them; and a mortgagee could not be charged with rent for that which appeared to be, in truth, of no annual value.

The VICE-CHANCELLOR was of this opinion, and over-ruled the exception.

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### HAGLEY v. WEST.

(3 L. J. Ch. 63—64.)

1824.  
Dec.

A person who makes an adverse entry into, and takes an adverse possession of an infant's estate, cannot be treated as the bailiff of that infant; nor can a bill for an account against him in that character be sustained.

LEACH, V.-C.  
[ 63 ]

If a plaintiff avers that he became at a particular time well entitled to certain premises, the Court, upon demurrer, will intend that he became well entitled, not merely equitably, but also legally.

THE bill, filed by a husband and wife, stated, that the lady's father, upon the death of his wife, became entitled to certain leasehold premises; that the father died on the 1st of January, 1792, leaving his child then an infant; that Mr. T. West then entered into possession of the premises, and was still in possession of them; that he was accountable for the rents and profits thereof; and that the title deeds, upon which the right of the plaintiffs depended, had been lost or destroyed. It prayed a discovery and account.

To this bill there was put in a general demurrer, for want of equity. \* \* \*

HAGLEY  
v.  
WEST.

*Mr. Heald* and *Mr. M. West* appeared in support of the demurrer.

*Mr. Horne, contra.*

For the demurrer it was argued, that, according to the statement in the bill there was a possession adverse to the plaintiffs; the proper remedy, therefore, was at law, unless some circumstance was stated that extinguished the legal remedy. No circumstance of that kind was alleged.

\* \* \* \* \*

[ 64 ] THE VICE-CHANCELLOR :

This bill is filed by persons claiming a legal title to certain premises, which title, they say, accrued to them in 1792. That the title asserted by this bill is a legal title, I must intend, for there is not the least intimation that it is merely equitable. On this record they allege, that Mr. Temple West, immediately upon the death of the lady's father, entered fraudulently into the occupation of the premises, to which she was entitled. Undoubtedly, any person who enters upon an estate, without having a right to it, in one sense does so fraudulently; but that is not the species of fraud which belongs to the jurisdiction of this Court. Besides, these plaintiffs, it ought to be observed, have omitted to say, when this lady, in whose right the plaintiff claims, came of age; because, probably, it would have appeared from the specification of that date, that more than twenty years have elapsed; and the lapse of that interval of time (according to what is now the settled, but what I consider to be the new, law of this Court,) would have precluded her from any remedy in equity.

The next ground which has been alleged in support of the bill is, that, as this defendant entered into the possession of the estate of an infant, he made himself a bailiff for the infant; that as such bailiff he must account; that the bill, so far as it seeks an account, may therefore be sustained; and, consequently, that the demurrer must be overruled. The doctrine, that he who receives the rent of an infant's estate, is to be treated as that infant's bailiff, is applicable only when the infant is in

legal possession, either by tenants or by guardians ; and, without question, when the infant is in legal possession, he who receives the rents is considered as receiving them on the infant's account. But that doctrine was never extended to the case of the adverse possession, or seisin of a stranger. The infant must assert his legal title against such adverse possession or seisin, before he can claim an account of the rents.

HAGLEY  
v.  
WEST.

\* \* \* \* \*

*The demurrer was allowed.*

ATTORNEY-GENERAL v. THE CORPORATION  
OF WINCHESTER.†

(3 L. J. Ch. 64—66.)

1824.  
Dec.  
LEACH, V.-C.  
[ 64 ]

Misapplication of charity funds. Account against a corporation. Payment of money into Court. Allowance to relators.

Where the income of estates given to a corporation for specific charitable purposes has, for a long series of years, been misapplied, an indefinite account will not be directed against the corporation.

*Semble* : That the account will not be carried back beyond the filing of the bill.

Where, upon an information to establish and administer a charity, it appeared from the report that sums belonging to the charity were in the hands of the defendants, but no account had been directed against them by the decree, no order could be made that they should pay the money into Court.

[ \*65 ]

Relators, on an information upon which abuses in a charity are proved and corrected, are entitled to have allowed to them not merely costs as between party and party, but their costs, charges, and expenses.

An information was filed, at the instance of certain relators, for the establishment and due administration of some charities, in which the Corporation of Winchester, it was alleged, had been guilty of great abuses.

A second and similar information was also filed against the same corporation, which confined the relief it sought to the due administration of the property of St. John's Hospital, and of another charity annexed to that hospital.

On the 12th of May, 1817, a decree was made on the first information, by which it was referred to the Master to inquire what donations, devises, and bequests had been made to the

† Cp. *A. G. v. Mayor of Exeter*, p. 105 above.



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v.  
THE COR-  
PORATION OF  
WIN-  
CHESTER.

Corporation of Winchester, and were then subsisting, for the benefit of poor persons within the liberties of Winchester: and he was also to take an account of the rents and profits, since the filing of the bill, of the charity estates.

The second information was brought on to a hearing on the same day; and upon it the Court directed inquiries with respect to the property belonging to the hospital of St. John.

It appeared by the report, that the Corporation of Winchester had long been in the receipt of the rents and profits of the lands given to St. John's Hospital for charitable purposes—that the corporation had diverted them from their proper purposes, and applied them to the general purposes of the corporation—and that there was in the hands of the corporation certain sums arising from the profits of those lands.

The Master had not included them in the account which he took in the first information.

The *Solicitor-General*, *Mr. Horne*, and *Mr. Tinney* were in support of the information.

*Mr. Hart* and *Mr. Trollope* appeared for the Corporation of Winchester.

The principal point argued was, how far the account of the rents and profits of the lands belonging to St. John's Hospital and the charity connected with it, ought to be carried back.

THE VICE-CHANCELLOR:

\* \* For centuries this charity had fallen into desuetude; and its revenues had been applied by the corporation for general purposes. How can a court of equity hold the present members of the corporation responsible for all past misapplication of the charity funds?

In such suits, the object of the Court is to re-establish a charity which has been lost. How is that to be effected? By an accumulation of rents and profits for a hundred years past? That would be to establish a new charity, because, for a long period of \*time, the will of the testator had not been executed.

Suppose the corporation were ordered to pay 5,000*l.*, what would there be to be done with that fund? The revenues are ample enough for the purposes of the charity.

I proceed upon these principles :

1st, No severe moral reproach attaches to the Corporation of Winchester, for the misapplication of the charity funds; for there is nothing that can reasonably be called corruption in continuing without inquiry a practice which has continued for centuries.

2ndly, I must presume that all corporation revenues are, from time to time, applied according to their due purposes. If, therefore, I were to carry back a retrospective account, and order payment of the balance which upon such account should be found due, I should defeat some other purpose of the corporation.

3rdly, An indefinite retrospective account is not necessary for re-establishing the charity.

Upon these principles, I cannot give an account for a longer period than from the filing of the bill.

\* \* \* \* \*

The last point discussed at the hearing of the cause, was the payment of the relators' costs.

The VICE-CHANCELLOR stated, that relators in such cases were persons discharging a great public trust; that they ought to be completely indemnified; and, therefore, that they ought to be allowed their costs, charges, and expenses.

These costs, charges, and expenses were directed to be paid out of the monies belonging to the charity, without prejudice to the question by whom they were to be borne ultimately.

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### BAILEY *v.* TAYLOR.

(3 L. J. Ch. 66.)

Copyright in tables. Acquiescence in trifling infringement.

[See the report of this case at the hearing, 1 Russell & Mylne, 73.]

1825.

March 26.

Lord  
ELDON, L.C.  
[ 76 ]

## KINDER v. TAYLOR.

(3 L. J. Ch. 68—84.)

\* \* \* \* \*

THE LORD CHANCELLOR :

This is a case distinguishable, undoubtedly, from many of the speculations now in vogue. I may however say, that rumours are abroad that persons have formed companies, and have given descriptions, and held out a prospect of vast benefits to arise from them, never intending themselves to continue members; but raising large sums of money upon the credulity and avarice of individuals with whom they deal. It may be well for such men to be aware, that it is said by those who understand the law better than I do, that it is a question, whether, if persons so engaging should happen to be indicted for a conspiracy to form a company not meaning to form it, but meaning to withdraw themselves from their engagements by selling their shares to other persons, such conduct would not amount to a deceit and fraud, upon which the indictment might be sustained.

\* \* \* \* \*

1825.

March 9.

LEACH, V.C.  
[ 87 ]

## BOLTON v. COOKE.

(3 L. J. Ch. 87—88.)

Parol evidence may be given to show, as between the two co-obligors in a bond, that one of them was only a surety for the other.

A and B join in a bond to secure money borrowed by B, for the use of a third person: as between A and B, A is only a surety.

PHILIP MIGHELL had carried in a claim as a creditor for upwards of 800*l.* upon the estate of David Bolton, which was in a course of administration, under the direction of the Court. The Master, in pursuance of an order obtained by petition, made a separate report, deciding against Mighell's claim. To that report an exception was taken, alleging "that the Master ought to have certified that Mighell executed a certain bond at the request of, and as surety for, and under an agreement of indemnity in respect of it from David Bolton, deceased; and became therefore, and is a creditor on the estate of the said David Bolton, for 800*l.* and legal interest thereon, at the rate of 5 per cent. from the 4th of May, 1816."

The case set forth in the charge, which Mighell carried in, and repeated in his affidavit, was in substance as follows:—John Davis, the son-in-law of Bolton, being in embarrassed circumstances, and residing at Brighton, Bolton came from London in order to find means of assisting him, and applied to Mrs. Davis (the mother of John Davis,) to advance him 300*l.* for that purpose. She refused to do so, unless Mighell would join in the bond, which was to be given her for the amount. Mighell was then sent for, and agreed to join in the bond; and Bolton returned to London. The bond being prepared in London, and executed by Bolton, was sent down to Brighton, where it was executed also by Mighell. It bore date the 11th of May, 1811, and was joint and several. The money was then paid by Mrs. Davis to Mighell, who, it was clearly shown, applied the whole of it to the relief of Davis's embarrassments. Bolton died in May, 1814; and on the 4th of May, 1816, Mighell was compelled to pay 300*l.* for the principal and the interest due on the bond.

That Bolton came to Brighton to assist Davis; that he applied for a loan of 300*l.* to Mrs. Davis; that she refused to lend the money, without the security of Mighell; that Mighell consented to join in the bond for that purpose; and that the money was applied wholly to the use of Davis:—these facts were established by the affidavits of the solicitor of Bolton, and of a daughter of Mrs. Davis, through whom the negotiation for the loan was carried on.

*Mr. Heald* appeared in support of the exception :

*Mr. Rose* and *Mr. Batley* for different parties in support of the report.

For the report it was argued, that Mighell and Bolton were, upon the face of the bond, principal creditors; and that parole evidence could not be received to prove, that the one of them was only a surety for the other. Bolton had not received the money; how, then, could the whole of the demand be raised out of an estate, which had not received any part of the benefit? Either Mighell and Bolton were both principal debtors, or they were both

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sureties. Whichever branch of the alternative was taken, the result was the same, viz., that Mighell could not throw the burthen exclusively on the assets of Bolton. If he had come claiming a contribution, the question would have been altogether different.

THE VICE-CHANCELLOR :

The son-in-law, being in embarrassed circumstances, applies to his father-in-law (Bolton) for relief; and Bolton, again, not having a command of money at the moment, requests Davis's mother to lend him (Bolton) 300*l.* for that purpose. She refuses to advance the money, unless Mighell shall become a surety for the repayment of it. Accordingly, Mighell and Bolton join in a bond; and the money is paid through Mighell to Davis. Afterwards the obligee compels Mighell to satisfy the amount; and the question is, whether he can recover the whole amount against Bolton's estate.

[ \*88 ] Now that Bolton did not receive the \*money, is a circumstance altogether unimportant. He borrowed the money, and it makes not the slightest difference, whether he borrowed it for his own use, or for the use of another. The money was lent, not to Davis, but to Bolton. Mighell and Bolton are not sureties for Davis; they are both principal debtors to the mother: but as between themselves, Mighell was only surety for Bolton. The transaction is precisely the same as if this bond had been given for money advanced to Bolton.

It has been objected that Mighell is attempting to vary, by parole evidence, the tenor of the bond. There is, however, no doubt that parole evidence† may be received to prove that one of two co-obligors was, as between him and the other, only a surety.

† See *Craythorne v. Swinburne*, 9 R. R. 264 (14 Ves. 160, 170).

## ANONYMOUS.†

(3 L. J. Ch. 99—100.)

1825.

LEACH, V.-C.

[ 99 ]

A person who makes a contract as trustee for others, cannot sustain a suit for specific performance, without joining them along with him.

If his cestuis que trust are the members of a numerous company, some of them, suing on behalf of themselves and all the other members, ought to join with him as co-plaintiffs.

A COMPANY, consisting of a great number of persons, were desirous of purchasing certain premises for the partnership purposes. Accordingly the plaintiff, as trustee for the company, contracted for the purchase of them.

The vendor subsequently declined to complete the contract: and the trustee filed his bill for specific performance against him.

The members of the company were not named as co-plaintiffs.

The defendant demurred on the ground of want of parties.

The defendant, it was argued on behalf of the demurrer, ought not to be harassed with a suit which could not be conclusive, because the cestuis que trust were not parties to it. If a decree were made in his favour to-day, the persons beneficially interested in the alleged contract, might institute another suit to-morrow.

In support of the bill, it was said, that the company consisted of so many persons that it was impossible to make them all parties.

THE VICE-CHANCELLOR :

This plaintiff, not possessing the beneficial interest in the contract, is not entitled to institute a suit for specific performance. Those on whose behalf he contracted, ought to be before the Court. If they are so numerous that they could not all be made parties, some of them, suing on behalf of themselves and the other members \*of the company, ought to have been joined with him as co-plaintiffs.

[ \*100 ]

*The demurrer was allowed.*

† See now in England R. S. C. Ord. xvi., rr. 8, 9.

## DAVIDSON v. DAVIDSON.

(3 L. J. Ch. 103—105.)

1825.

Feb. 21.

*Rolls Court.*

Lord

GIFFORD,

M.R.

[ 103 ]

A testatrix devises real estates to trustees upon trust, to raise out of the same, by mortgage, a sum sufficient to pay certain legacies, which are made payable twelve months after her decease, and subject to that charge in trust for R. N. in fee: "provided that if R. N. shall not, within six calendar months after my decease, by writing under his hand and seal, &c., accept the devise; and shall not at the same time secure to the satisfaction of the said trustees, or pay to them a sum of money sufficient to satisfy the legacies;" she directed her trustees to stand seized of the real estates upon trust to sell the same, and to distribute the money among the legatees, in proportion to the amount of their several legacies: R. N. died in the lifetime of the testatrix. Held, that the legatees are entitled only to their legacies, and not to the whole produce of the estate.

Mrs. NICHOLSON, being entitled to two undivided third parts of Wellington farm, held by copyhold tenure, by her last will, devised those two undivided third parts and also her two undivided third parts of certain other premises, to the use of Robert Davidson and William Grey, their heirs and assigns for ever, upon the following trusts, that is to say, "Upon trust, within twelve calendar months next after my decease, by mortgage of the same premises herein last before devised, or any part thereof, to raise and levy such sum or sums of money as shall be sufficient to satisfy and pay the several pecuniary legacies hereinafter given, to the several persons hereinafter named, and subject thereto, the said copyhold premises herein last before devised, are to be in trust for Robert Nicholson, of Bishop Wearmouth, his heirs and assigns for ever. I give the several legacies or sums of money to the several persons hereinafter named." Then came a clause in which she bequeathed various legacies. After these bequests, the will went on in the following words: "And I direct that the several pecuniary legacies herein last before given, shall be raised and paid by my said trustees, at the end of twelve calendar months next after my decease, but without any interest in the mean time for the same; and in case any of the said legatees shall at that time be under the age of twenty-one years, their legacies or respective legacies shall then be paid to them, notwithstanding their respective minorities, whose receipts for the same shall be a sufficient discharge to the person or persons

paying the same: provided always nevertheless, and I declare that if the said Robert Nicholson, his heirs or assigns, shall not, within six calendar months next after my decease, by some writing under his hand and seal, to be attested by two or more credible witnesses, and to be delivered to my said trustees, signify his intention of accepting the devise, hereinbefore made to him of my two third parts of the copyhold farm called Wellington farm, chargeable with the said legacies hereinbefore directed, to be raised and paid thereout; and shall not at the same time secure to the satisfaction of my said trustees, or pay to them a sum of money sufficient to satisfy and pay the said several legacies hereinbefore directed to be paid thereout, \*then from and immediately after the expiration of six calendar months next after my decease, I direct that my said trustees or the trustees for the time being of this my will, shall stand and be seized of my said two third parts or shares, and all my other parts or shares of my said copyhold farm called Wellington farm, freed and discharged of and from the trusts hereinbefore thereof declared, upon the trusts following, that is to say: upon trust absolutely to sell and dispose of the same premises, either entirely or in parcels, either by public sale or private contract, to any person or persons who shall be willing to become purchaser or purchasers thereof, for the best price or prices that can be reasonably had or gotten for the same; and out of the money therefrom arising, in the first place, to satisfy and pay the several pecuniary legacies hereinbefore given to my servants; and as to the residue thereof in trust, to distribute and pay the same to the several legatees, except my servants, whose legacies are hereinbefore directed to be raised and paid out of the said farm called Wellington farm, in proportion to the several legacies hereinbefore given to them, whether the same shall exceed or be less in amount than such legacies respectively."

Robert Nicholson, the devisee, was also the apparent customary heir of the testatrix. He died in her lifetime.

The bill was filed by the legatees against the trustees and the heir at law. It prayed that they might be declared entitled to have the estate sold, and the produce divided, after satisfying the legacies to the servants, among them, in the proportion of their

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[ \*104 ]



DAVIDSON v. DAVIDSON. respective legacies; and that the estate might be sold, and the money obtained for it, distributed accordingly. If the Court should be of opinion, that they were not entitled to this relief, they then prayed that their legacies might be raised and paid.

*Mr. Horne* appeared for the legatees;

*Mr. Sugden* for the heir-at-law;

*Mr. Treslove* for the trustees.

[ 105 ] THE MASTER OF THE ROLLS :

My opinion is, that in the events which have happened, these legatees are entitled only to the legacies bequeathed to them, and that they are not entitled to have the whole produce of the property divided among them proportionally to the amount of their respective legacies.

With respect to what has been said concerning the intention of the testatrix, and concerning her purpose of confining her bounty exclusively to her devisee and her legatees, the Court cannot be influenced by those topics. The truth is, the will contemplates the event of Nicholson surviving the testatrix, and does not expressly contemplate the event of his dying before her. The devise to him, and all the dispositions and directions connected with that devise, are obviously made in the anticipation of his being the survivor. And it is quite clear, that there is no devise or bequest in the will framed in contemplation of the event which has happened.

The first devise of the testatrix is to the use of trustees, for the purpose of raising certain legacies by mortgage; and subject to these legacies, the equitable fee is devised to Nicholson. Then she goes on to provide a further security for the legacies, by requiring Nicholson, within six calendar months, to give security for the payment of the legacies; and upon his failing to do so, the trustees are to sell the estate, and also to distribute the produce among the legatees.

Now, under the first part of the will, the legatees are entitled only to have their legacies raised out of the real estate; and I cannot construe the subsequent clause, which merely provides a

further security for the payment of the legacies by the devisee, into a devise of the surplus produce of the estate to the legatees, in case the devisee died in the lifetime of the testatrix.

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It was proposed that the costs of all parties should come out of the estate.

*Mr. Sugden* objected to this ; because, in that case, the whole would fall ultimately on the heir at law. The plaintiffs had insisted on a claim in which they had failed, and should therefore alone bear so much of the costs as were occasioned by that claim.

*Mr. Horne* replied, that the trustees would not act without the direction of the Court ; that the legatees were obliged to file their bill, to have their legacies raised ; and that no addition was made to the expense of the suit by the assertion of that claim in which they had failed, and should, therefore, alone bear so much of the costs as were occasioned by that claim.

Finally, the costs were ordered to be borne proportionally by the portion of the estate belonging to the legatees, and by the surplus of the heir at law.

## CAMPBELL v. CAMPBELL.

(3 L. J. Ch. 129—130.)

1825.  
Jan. 17.

Where money has been lent originally to a partner in an old firm, and he dies ; what shall be sufficient evidence that the creditor adopted the new firm as his debtors.

LEACH, V.-C.  
[ 129 ]

If the creditor, being also one of the executors of his original debtor, makes no demand for many years upon the new firm to pay the sum to the original debtor's estate, he will not be allowed, after the bankruptcy of the new firm, to claim it as a debt due to him from his testator's assets.

MR. J. BAILLIE lent a sum of 10,000*l.* to Mr. Duncan Campbell, for the purpose of being employed in the mercantile concern in which Mr. Campbell was a partner. Mr. D. Campbell died, and appointed Mr. Baillie one of his executors. Immediately upon his death, a new firm was established, by which the trade was carried on. This new firm was employed by Baillie as his general agents. In the mean time, he took no steps to obtain payment

CAMPBELL of his debt of 10,000*l.*, either from the assets of D. Campbell,  
CAMPBELL, or from the old partnership; but, in his account with the new firm, he was annually credited with 500*l.* as interest upon that sum. After some years the new firm became bankrupt; and then the question arose, whether or not he had adopted the new firm as his debtors.

The Master had come to the conclusion that Baillie either had adopted the new firm as his debtors, or had so conducted himself in his character of executor as to have discharged his testator's estate. To his report exceptions were taken.

*Mr. Hart* appeared in support of the exceptions;

*Mr. Heald* for the report.

THE VICE-CHANCELLOR :

The old firm had been Mr. Baillie's general agents; he continues the new firm in the same office, and, in that character, intrusts them with a very extensive confidence. The whole of his large yearly income passes through their hands, up to the time when they become bankrupt. They render to him annually a general statement of their payments and receipts on his behalf; and among the sums for which they regularly give him credit, is 500*l.* as interest on the 10,000*l.* originally lent by him to Mr. D. Campbell.

It is argued, that this is evidence that he did not adopt the new firm as his debtors; for they would, in that case, have made themselves debtors, not for the interest alone, but for the principal also. That, however, is a mistake; for the accounts are accounts of receipts and payments during the year, on account of Mr. Baillie; and consequently, the principal sum of 10,000*l.* could not be included in any of them.

I admit that the single circumstance of paying interest would not alone be conclusive; for though, *primâ facie*, the payment of interest is proof that those who pay it are the debtors, yet the payment may have been made by them as agents for the real debtor. That supposition, however, seems to me to be excluded here, by the tenor of Mr. Baillie's correspondence after Duncan

Campbell's death. In one letter, he says, "I leave it (the 10,000*l.*) with them (the surviving partners) \*now, although he (D. Campbell) is no more."

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v.  
CAMPBELL.  
[ \*130 ]

On general grounds, also, I should have thought the Master's conclusion right. Mr. Baillie being the executor of the deceased partner, his original debtor, it was his duty to have collected that partner's estate; and, in the discharge of that duty, to have called upon the new firm to pay the 10,000*l.* to D. Campbell's estate, which that estate again was liable to pay to him. To protect his testator's estate, he was bound to have called in the money as a debt due to his testator. Not only does he not do so, but he represents to his co-executor, that he leaves the money with the new firm, and thus disarms that co-executor's diligence. Under such circumstances, he cannot be permitted now to raise the demand against Duncan Campbell's estate, after having so long abstained from using any diligence to recover it, and having disarmed the diligence of his co-executor.

It has been said, that there could be no adoption of the new firm as debtors, without a consideration for the release of the old firm, and that here there was no consideration for that release. To that argument the answer is, that it is a sufficient consideration to release the estate of A, that B becomes liable.

### POTTS v. POTTS.

(3 L. J. Ch. 176—177.)

1825.  
May.

Equitable waste consists in cutting either timber planted for ornament or shelter, or saplings and young trees, before they are fit for timber.

LEACH, V.-C.  
[ 176 ]

It is not equitable waste to cut trees which have not attained their full growth and maturity; and an injunction to restrain a tenant for life, unimpeachable of waste, from such cutting, cannot be sustained.

The Court will not maintain an injunction against equitable waste, unless it be proved that equitable waste either has been committed, or is threatened.

In this case an injunction had been obtained against the defendant, to restrain her from committing equitable waste. The injunction, besides the usual clauses, contained words restraining her from cutting full \*grown trees, which had not attained their full growth and maturity, whether planted for ornament and shelter or not.

[ \*177 ]

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v.  
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By her answer the defendant admitted, that she had employed a surveyor to look over the timber on the estate, and that she had cut, and intended to cut, trees fit for felling. But she denied that she had cut, or meant to cut, young trees or saplings, or trees planted for ornament or shelter. She admitted that she meant to cut immature timber.

*Mr. Roupell* moved to dissolve the injunction.

*Mr. Sugden, contra.*

The plaintiff insisted, that, if the injunction could not be maintained in its full extent, it ought at least to be continued, so far as it restrained the defendant from doing that, which it was clear she had no right to do.

THE VICE-CHANCELLOR :

There are only two sorts of equitable waste—cutting young trees and saplings, before they are fit for timber, and cutting timber planted for ornament or shelter. This injunction, however, goes much further. It restrains a tenant for life without impeachment of waste, from cutting any timber, except timber attained to full maturity. Such an injunction was never before heard of; and if the attention of the Court had been called to the frame of it, would never have been permitted to issue. This Court has jurisdiction to restrain a tenant for life unimpeachable of waste, only from equitable waste: of equitable waste there are only the two species which I have just mentioned; and the cutting of full grown trees, which have not attained their full maturity, falls within neither the one nor the other. It is impossible, therefore, to support this injunction, so far as it seeks to restrain the cutting of all timber, which has not attained its full growth.

Ought it then to be modified, so as to restrain the cutting of saplings and young trees, not yet become timber? A plaintiff, in order to entitle him to restrain a defendant from the full enjoyment of his legal rights, unfettered by the interference of this Court, must, either by proof or by admission from the other

party, make out a plain case, that a cutting, amounting to equitable waste, either has taken place or is threatened. This lady by her answer says, that in February last she employed a surveyor to examine the timber, and to mark for cutting the trees that were fit to be felled; and she admits that timber, and timber-like trees, were cut, and that she means to cut immature timber; but she declares, that she has no intention of committing equitable waste. Under such circumstances the injunction must be wholly dissolved.

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v.  
POTTS.

*The injunction was dissolved.*

# ABERNETHY v. HUTCHINSON.†

(3 L. J. Ch. 209—219.)

Where the Court is called upon to restrain a publication, on the ground that it is a piracy of a composition which has been substantially reduced into writing; it is the duty of the Court to see that the plaintiff produces his written composition.

An injunction will not be granted to restrain an alleged piracy of lectures delivered orally, when no written composition substantially the same with these lectures is produced.

Persons attending an oral lecture have no right to publish it for profit.

An action upon the implied contract will lie against a pupil attending an oral lecture, who causes it to be published for profit.

The Court will grant an injunction against third persons publishing lectures orally delivered, who must have procured the means of publishing those lectures from persons who attended the oral delivery of them, and were bound by the implied contract.

THE bill was filed by the distinguished surgeon, Mr. Abernethy, against G. L. Hutchinson, John Knight, and Henry Lacey.

The prayer was, that an account might be taken of the profits derived by the defendants, any or either of them, from the sale of surgical lectures delivered by the plaintiff—and that they might be restrained from printing and publishing any other work or \*works, publication or publications, being or purporting to be lectures delivered, or to be delivered, by the plaintiff; and also from reprinting and republishing the surgical lectures, or any

1824.  
Dec. 10, 18,  
22, 23.

1825.  
June 10, 17.

Lord  
ELDON, L.C.  
[ 209 ]

[ \*210 ]

† *Caird v. Sime* (1887) 12 App. Ca. 326, 57 L. J. P. C. 2. The principal case was reprinted from the present report with some abridgment, and

with due permission and acknowledgment, in 1 H. & T. 28, as an appendix to *Prince Albert v. Strange*.

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works or work, publications or publication, being or purporting to be delivered by the plaintiff, or any or either of them.

The case stated in the bill was : \* \*

That on the 4th day of October, 1824, the plaintiff commenced the delivery of a course of lectures on the principles and practice of surgery, at the Theatre of St. Bartholomew's Hospital, to his pupils, and to students and persons desirous of acquiring a knowledge of surgery, and who, previously to the commencement of the intended course, had respectively been admitted by him as attendants upon such course, and had signed their names respectively in a book provided for that purpose, and had paid the fees for the privilege and permission of attending the same : that the said course of lectures was and is to consist of about thirty lectures, to be delivered by the plaintiff : \* \* that successive numbers of "The Lancet" have been published, containing articles, entitled "Surgical Lectures delivered by Mr. Abernethy—Theatre, St. Bartholomew's Hospital : " that the articles respectively profess to be the publications verbatim of the plaintiff's lectures respectively, and are advertised as intended to be, from time to time, published in regular continuation : \* \* that G. L. Hutchinson, John Knight, and Henry Lacey, are jointly interested in the profits of the said publication, and have received considerable sums in respect thereof : that the plaintiff hath not given \* \* to any person or persons, any authority whatsoever to print or publish the said lectures, either in whole or in part : \* \* that the plaintiff alone has the property in the said lectures, and in the sentiments and language thereof ; and that the copy or writings from which the same have been, and are in future to be delivered, is and are the property of the plaintiff.

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On the other hand, the defendant, Hutchinson, filed an affidavit, stating : \* \* that the principles inculcated and delivered by the plaintiff in such lectures, are not new principles originating with the plaintiff, but are substantially the same principles and practices of surgery as were originally promulgated by the late surgeon, John Hunter, and others, as will appear by a comparison of such lectures with the publications and works

of the said John Hunter: that the lectures delivered by the plaintiff have been delivered extemporaneously, and were not read from any papers or other writing at the time of the delivery thereof, and are illustrations of the principles of surgery, as laid down by John Hunter, and others, for the most part derived by the plaintiff from cases in the performance of his duty as a surgeon in the said hospital.

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SON.

Upon the case appearing from these affidavits, the plaintiff moved for an injunction, according to the prayer of his bill.

The *Solicitor-General* and *Mr. Rose* were in support of the motion.

\* \* \* \* \*

THE LORD CHANCELLOR :

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The first question is, whether an oral lecture is within the protection of the law? Now, as far as my recollection goes, that has not yet been the subject of determination. On the other hand, if there be a lecture apparently oral, but which is, nevertheless, delivered, by the assistance of a very good memory, from a written composition, the question then will be, if it could not be made out in point of law that an oral lecture, or an oral sermon was within the protection of the law, whether protection is due to the written composition? Another question will be, whether this Court would interfere, before notice had been given that that apparently oral lecture, was the delivery of matter from a written composition? And a farther question will be, whether—if the oral lecture is to be protected by the fact that it is, in truth, the delivery of a written composition—it does not lie on those who insist that that circumstance gives the protection of the law to that which appears to be orally delivered, to produce and show that written composition, in order to make out their case?

\* \* \* \* \*

*Mr. Horne* and *Mr. Shadwell* for the defendants, contended for the following points :

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First—It was clear that there was here no written composition. The language of the affidavit was merely that the lectures were delivered as from a written composition.



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Secondly—It had never been decided, that a man could have any right of property in ideas and language not reduced into writing. Such a right might exist, or might not exist; but it could not be protected by an injunction, till its existence was acknowledged at law.

Thirdly—The present case could not be assimilated to that of a lecture delivered voluntarily: for it was not optional in Mr. Abernethy to give or to withhold his lectures; the delivery of them was a part of his duty, as one of the surgeons of the hospital.

Fourthly—The defendants were the publishers; and there was nothing to connect them with any of the persons attending the lectures, or to affect them with any condition which Mr. Abernethy might impose on his pupils.

\* \* \* \* \*

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The LORD CHANCELLOR delayed proceeding further with the motion, but ordered it to stand for the 20th of December. "In the mean time," said his Lordship, "Mr. Abernethy may, if he thinks proper, produce his manuscripts; and, on the other hand, the defendants will judge for themselves whether they will or not—and I do not require it of them, because I have no right to inform me, how they became possessed of the means of publishing this work, with a view that I may consider what can be made of the argument of trust, or of the argument founded on fraud."

Mr. Abernethy made an additional affidavit, stating, that he has given his lectures, as most lecturers do, orally, and not from a written composition; but, that previously to the delivery of such lectures, he has from time to time committed to writing notes of such his said lectures, which have been increased and transposed, until a great mass of writing has been collected, written in as succinct a manner as possible, with a view to exhibit the arrangement he has formed, and the facts which he has collected, together with his opinions relative to certain subjects of surgery: that a considerable portion of such notes have been by or under the direction of this deponent extended and put into writing with a view to publication, which writings he is ready to submit to the inspection of any respectable and com-

petent person, as a test of this deponent's accuracy in the statement made to the Court in his former affidavit, and that such writings are in his possession: that at the time of delivering his said lectures, he did not read or refer to any writing before him, but that he delivers such his lectures orally, and from recollection of such notes and writings, and that the lectures so delivered by him, though not verbatim the same as his notes and writings, yet are in substance, arrangement, and statement of the facts, substantially the same: that such lectures vary from time to time both in the language and arrangement, according to circumstances, and from any new matter that may have occurred to him by way of illustration or otherwise: that on a comparison of the written notes or lectures with those so orally delivered by him, they will and must necessarily vary, and in like manner they will be found to vary, from the lectures pirated, or alleged to be pirated, by the defendants, in the publication called "The Lancet:" that the composition of the said lectures, so reduced into writing, have cost him much time and study for a long series of years: that his duties as a surgeon to St. Bartholomew's Hospital and lecturer are entirely distinct, and that it is not a part of his duty as such surgeon to deliver lectures, but that the same are in the nature of private lectures, and are not attended by any persons unless by his permission, and are not in any way open or accessible to the public.

The case was again argued.

THE LORD CHANCELLOR :

If Mr. Abernethy had produced in Court the writings from which he says his lectures were really delivered, so that I might myself have exercised a judicial opinion upon those writings, and have seen that his lectures, though orally delivered, were delivered from what I should say was a literary composition, I should have had no difficulty in the case. If, on the other hand, in comparing what is said to have been orally delivered, and what has got into this book called "The Lancet," with the notes, I could not accurately have referred the publication to those notes, as being the same, (I mean with those trifling literary

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[ \*217 ]

distinctions which must exist in such cases,) I should then have known what to have done, by not applying myself to any \*thing but a reference to authorities. But I apprehend, that if those notes are not produced and made—substantially made—part of the case before me, the Court has but two ways of proceeding left to it :—the Court must either refer it to the Master to inquire whether what is admitted to have been published in this book is the same as the notes ; or it must decide the case by calling upon the lecturer to deliver the notes to the Court itself, that the Court may see whether they are the same. And it may be very inconvenient to produce those notes ; so much so, that I should not be surprised if a gentleman, such as Mr. Abernethy, would rather suffer himself to go out of this Court without a judgment than produce the notes. But if he had gone to the Master, which would have been the more private way, the Master must have reported to me, and if there had been an exception taken to his report, there must afterwards have been a public production in this Court. The consequence of all this is, that I am compelled to look at the present case as that of a lecture delivered orally. In *Millar v. Taylor*† there is a great deal said with respect to a person having a property in sentiments and language, though not deposited on paper ; but there has been no decision upon that point yet ; and as it is a pure question of law, I think it would be going farther than a judge in equity should go, to say upon that, that he can grant an injunction upon it, before the point is tried.

There is another ground for an injunction, which is a ground arising out of an implied contract. I should be very sorry, if I thought that any thing which has fallen from me, should be considered to go the length of this—that persons who attend lectures or sermons, and take notes, are to be at liberty to carry into print those notes for their own profit, or for the profit of others. I have very little difficulty upon that point. But that doctrine must apply either to contract or breach of trust. Now, with respect to contract, it is quite competent for Mr. Abernethy, and for every other lecturer, to protect himself in future against what is complained of here. There is a contract expressed and a contract implied ; and I should be very sorry to have any man

† 4 Burr. 2303.

understand, that this Court would not act as well upon a contract implied, as upon a contract expressed, provided only the circumstances of the case authorize the Court to act upon it. I have not the slightest difficulty in my own mind, that a lecturer may say to those who hear him—"You are entitled to take notes for your own use, and to use them, perhaps, in every way, except for the purpose of printing them for profit; you are not to buy my lectures to sell again: you come here to hear them for your own use, and for your own use you may take notes." In the case of Lord Clarendon's work, the history was lent to a person, and an application was made for an injunction to stay the publication; it was said there, that there was no ground for the injunction; and it was proved on affidavit that my Lord Clarendon's son said, There is the book, and make what use you please of it; the Chancellor however of that day said, that he could not mean he was to print it for his profit. So with respect to letters, my Lord HARDWICKE says, in one case, that the person who parts with letters still retains a species of property in them; and that the person who receives them has also a species of property in them. He may do what he pleases with the paper, he may make what use he pleases of the letters, except print them. There he puts the jurisdiction upon the ground of property. In other cases we find it put upon the ground of breach of a trust—that the letter is property, part of which I have retained, and part I have given to you; you may make what use of the special property you have in it you please, but you shall not make use of my interest in it; therefore you shall not print it for profit. Now, if there is an express contract—for instance, if Mr. Abernethy says, "Gentlemen, all of you who attend, and pay five guineas for attending my lectures, may take notes of what I say, but let it be understood that you shall not print for profit;" then in that case I should not have the least difficulty in saying, if any student afterwards did think proper to publish for profit, that there is hardly a term which this Court would think too harsh for him; and it would restrain him. There is another ground, which is, whether, looking at the general nature of the subject, it is not very difficult to say, that

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there is not a contract which would call upon the Court to restrain the parties who hear the lectures, \*from publishing the notes they may have taken. They may make whatever use of them they please, but they ought not to publish them. If an express contract exists, or if any contract is to be implied, either contract would be the ground of an action for a breach of contract.

With respect to trust, the question here would be, whether there is not an implied trust with respect to the student himself? One thing is quite clear, that if those lectures have been published from short-hand writer's notes, they have been published from short-hand writers' notes taken by some student, or from short-hand writers' notes taken by some intruder into the lecture-room ; for I do not see, how it is possible that they could have been taken otherwise. If there is either an implied contract on the part of the student, or a trust, and if you can make out that the student has published, I should not hesitate to grant the injunction. With respect to the stranger, if this Court is not to be told (and certainly it has no right to compel the parties to tell), whether the power of giving the oral lectures to the public was derived from a student or not, I think it very difficult to tell me, that that should not be restrained which is stolen, if you would restrain that which is a breach of contract or of trust.

Upon the whole, taking this case as it now stands, as a case simply of oral lectures, it must be tried, whether it is legal to publish them or not. Upon the question of property in language and sentiments not put into writing, I give no opinion, but only say, that it is a question of mighty importance. At present, therefore, I must refuse the injunction ; but I give leave to make this very motion, on the ground of breach of contract or of trust.

Afterwards the bill was amended by the introduction of allegations, that no persons had a right to attend the lectures except those who were admitted to that privilege by the lecturer : that it had always been understood by him and those who preceded him in the office, and those who attended the lectures, that the persons who so attended did not acquire, and were not to acquire, any right of publishing the lectures which they heard :

but that the plaintiff and his predecessors respectively had and retained the sole and exclusive right of printing and publishing their respective lectures, for his and their own respective benefit : that there was an implied contract between the plaintiff and those who attended his lectures, that none of them should publish his lectures, or any part thereof : that the defendants had been furnished with the copy of the lectures, which they had printed, through the medium of some person who had attended the lectures under Mr. Abernethy's above-mentioned permission ; and that it was a breach of contract or trust in such person so to furnish the copy, and in the defendants to print and publish the same.

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These allegations being verified by the affidavit of the plaintiff—

The *Solicitor-General* renewed his motion for an injunction. He argued, that there was an implied contract between the lecturer and pupil. The latter bought of the former a right to hear (perhaps to write down) his lectures, but not to publish them. He did not purchase the lecturer's science that he might sell it again. As to the question of copyright—to whom did it belong? There could not be two copyrights ; such an idea was repugnant to common sense as well as to law.

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*Mr. Abercromby, Mr. Rose, and Mr. Duckworth,* followed on the same side.

The motion was opposed by *Mr. Horne, Mr. Shadwell, and Mr. Brougham.*

THE LORD CHANCELLOR :

Without deciding the question of literary property in this case, therefore, but merely excluding it ; the point to be determined was—whether there were such a violation of contract as to sustain an action ; if not, whether an injunction could be asked for. No evidence was given to show—first, whether the defendants attended as pupils ; or secondly, whether they received their report from a person guilty of a breach of trust ; or thirdly, whether a short-hand writer, not being a pupil, gave them a copy of the lectures. It was therefore a question, whether a stranger, not bound by contract, could be enjoined. Various considerations

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would arise out of this ; for a court of \*equity would be called upon to say, whether the means, by which the defendants were enabled to publish the lectures, might or might not be used. One view of the case which ought not to be lost sight of, was, that supposing the lectures to have been taken down by a pupil, who afterwards communicated them to the publishers, and you could not get at the pupil, you could not maintain an action. But in that case, the publishers might come under the jurisdiction of the Court, upon the ground of having made a fraudulent use of that which had been communicated to them, by one who had committed a breach of trust.

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The LORD CHANCELLOR stated, that where the lecture was orally delivered, it was difficult to say, that an injunction could be granted upon the same principle upon which literary composition was protected ; because the Court must be satisfied that the publication complained of was an invasion of the written work, and this could only be done by comparing the composition with the piracy. But it did not follow, that, because the information communicated by the lecturer was not committed to writing, but orally delivered, it was therefore within the power of the person who heard it, to publish it. On the contrary, he was clearly of opinion, that whatever else might be done with it, the lecture could not be published for profit. He had the satisfaction now of knowing, and he did not possess that knowledge when this question was last considered, that this doctrine was not a novel one, and that this opinion was confirmed by that of some of the judges of the land. He was, therefore, clearly of opinion, that when persons were admitted, as pupils or otherwise, to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling. There was no evidence before the Court of the manner in which the defendants got possession of the lectures ; but as they must have been taken from a pupil, or otherwise in such a way as the Court would not permit, the injunction ought

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to go upon the ground of property; and although there was not sufficient to establish an implied contract as between the plaintiff and the defendants, yet it must be decided, that as the lectures must have been procured in an undue manner from those who were under a contract not to publish for profit, there was sufficient to authorize the Court to say, the defendants shall not publish. He had no doubt whatever that an action would lie against a pupil who published these lectures. How the gentlemen, who had published them, came by them, he did not know; but whether an action could be maintained against them or not, on the footing of implied contract, an injunction undoubtedly might be granted: because if there had been a breach of contract on the part of the pupil who heard these lectures, and if the pupil could not publish for profit, to do so would certainly be what this Court would call a fraud in a third party. If these lectures had not been taken from a pupil, at least the defendants had obtained the means of publishing them, and had become acquainted with the matter of the lectures, in such a manner that this Court would not allow of a publication. It by no means followed, because an action could not be maintained, that an injunction ought not to be granted. One question had been, whether Mr. Abernethy, from the peculiar situation which he filled in the hospital, was precluded from publishing his own lectures for his profit: but there was no evidence before the Court that he had not such right. Therefore the defendants must be enjoined in future.

The only question remaining was, whether the delay, which had taken place in renewing the application, was a ground for saying that the injunction ought not to go to restrain the sale of such of the lectures as had been printed in the interim. His Lordship's opinion was, that the injunction ought to go to that extent, and should include the lectures already published.†

*Injunction granted.*

† *Note*.—In *Caird v. Sime* (note p. 237 above) it was shown from the record that in the principal case the injunction was dissolved by the Lord Chancellor within a few months after its issue, upon a motion by the defen-

dants, and without hearing parties: per Lord Watson, 12 App. Ca. at p. 347. The circumstances are not known; see, however, per Lord Fitzgerald (*diss.*) at p. 359.—F. P.



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BULWER *v.* HOARE.

(3 L. J. Ch. 227—232.)

## Appointment—Election.

By the marriage settlement of A, a term of years is limited to trustees, upon trust, to raise 16,000*l.* to be paid to all and every, or such one or more, exclusively of the other or others, of the child or children of the marriage, or to all and every, and such one or more, exclusively of the other or others, of the issue, born in the lifetime of A, of any such child or children, in such shares and proportions as A should by deed or will appoint; and in default of appointment, to the children in equal shares: A, by his will, after devising certain real estates to his first and other sons, in strict settlement, and reciting that he was, by the marriage settlement, authorised to appoint the sum of 16,000*l.* unto all or any one or more of his child or children, and grandchild or grandchildren, appointed 4,000*l.* to each of his children other than the child who should, under the preceding limitations, be entitled, as tenant for life, to the rents and profits of the devised premises: and as to the residue, if any, of the 16,000*l.*, he appointed the same unto such grandchild of his body as should, by the regular course of events, become entitled as tenant in tail in possession of the devised premises: A died, leaving three sons, the eldest of whom was tenant for life of the devised estates, and no grandchild. Held that, inasmuch as there might have been a grandchild born in A's lifetime, and as such grandchild would have been among the objects of the power, the appointment of the residue of the 16,000*l.* to a grandchild who, in the events that had happened, was not an object of the power, did not raise a case of election against the children, and that they were entitled to have the appointment of that residue declared invalid, and yet to retain all the benefits given them by the will.

[THE facts and documents upon which the question of election in this case turned are sufficiently stated in the judgment.]

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*Mr. Horne* and *Mr. Lynch* appeared for the plaintiffs.

*Mr. Heald* and *Mr. Walker*, for the other parties.

To support the case of election which was attempted to be raised, the authority of *Whistler v. Webster*† was chiefly relied on. \* \* \*

## THE MASTER OF THE ROLLS:

By the marriage settlement of Mr. and Mrs. Bulwer, a term is created for raising a sum of 16,000*l.* upon trust for any child

† 2 R. R. 260 (2 Ves. Jr. 367).

or children of the marriage, or any issue born in Mr. Bulwer's lifetime, of any such child or children, or both, in such shares as Mr. Bulwer should appoint, and in default of appointment, for the children in equal shares. He, by his will, after devising certain estates for the benefit of his children, appoints 4,000*l.*, part of the 16,000*l.* to each of them, except such child as should, under the limitations of his will, be tenant for life of the estates before devised; and as to the residue (if any) of the 16,000*l.*, he appoints it unto such grandchild of his body who should attain the age of twenty-one years, and who or whose issue should, by the regular course of events, and the death or deaths of the preceding tenant or \*tenants for life, become entitled to an estate tail in possession in the hereditaments and premises thereby devised, or who were, or whose issue, in case of any recovery having been suffered to bar such estate tail before it should vest in possession, would have been so entitled for the time being if such recovery had not been suffered, and to the executors and administrators of such grandchild. Mr. Bulwer left three sons, of whom the eldest is tenant for life; but he left no grandchild. The effect of his appointment, therefore, is to give 4,000*l.* to each of the two younger sons, and to leave the remaining 8,000*l.* unappointed, except by the clause giving it to a grandchild.

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It is perfectly well settled that if a person having a power of appointment over a fund gives part of it to individuals who are not objects of the power, and by the same instrument confers benefits on those who take the fund in default of a good appointment, they who so take must elect; and if they claim the benefits given them, must confirm the ineffectual disposition.

The present case differs from any that I have been able to find. Here, a person having a power of appointment among limited objects, refers to the power in his will, and professes to exercise it: and he exercises it in terms which are within the extent of his power: for he might appoint to a grandchild born in his lifetime. It happened, indeed, that there was no grandchild answering to that description. But the appointment was not necessarily, as in *Whistler v. Webster*, an excess of his

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HOARE. power: he has not clearly shown an intention to give to a person not an object of the power. The consequence is, that a case of election is not made out, and the 8,000*l.* must go as unappointed.

## K. B. TRINITY TERM.

## SARQUY AND ANOTHER v. HOBSON.†

(2 Barn. & Cress. 7—10; 4 Bing. 131—135; S. C. 3 Dowl. & Ry. 192;  
12 Moore, 474; 1 Younge & Jervis, 347 1 L. J. K. B. 222.)

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[ 7 ]

Upon a policy of insurance on goods, the ship being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; and in order to defray the expenses of the repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses: Held, that the underwriter was not answerable for this loss.

Assumpsit upon a policy of insurance on goods. The declaration alleged a loss by perils of the seas. Plea, general issue. At the trial before Abbott, Ch. J. at the sittings after Term, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:—

The plaintiffs, on the 12th May, 1817, effected a policy of insurance on West India produce in the ship *Pekin*, at and from Jacmel to the ship's port of discharge in Europe, without the Mediterranean and Baltic, with liberty to take in produce at the two contiguous ports of \*Acquin and Aux Cayes, and to proceed to St. Iago, in the island of Cuba, to finish her loading, and wait at or off any port in the channel for orders, or otherwise. The defendant subscribed the policy of assurance for 500*l*. The plaintiffs were interested to the full amount of the policy which was effected on their own account. On the 30th May, 1817, the ship *Pekin* was in safety in the island of Cuba, and was there laden by the plaintiffs with West Indian produce, and thence set sail to her port of discharge in Europe. In the course of her voyage the *Pekin* was overtaken by a tempest, and sprung a leak, and made so much water that it became necessary for the preservation of the ship and cargo, to make for the nearest port, which turned out to be the Havannah, to which port the master, after consultation with the crew, proceeded. Upon the arrival of the *Pekin* at the Havannah it became necessary, for the purpose of ascertaining the cause of her leaking, to discharge the cargo, which was accordingly done; and surveys of the ship

[ \*8 ]

† *Greer v. Poole* (1880) 5 Q. B. D. 272.

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[ \*9 ]

having been held, it was found expedient to remove the copper sheathing, in order to get at the leak, which was done; and the ship was repaired, new-caulked, and refitted for sea. Without these repairs the ship could not have proceeded on her voyage. The master of the *Pekin*, not having any other means of defraying the expenses occasioned by the repairs of the ship, sold part of the cargo, consisting of 716 bags and 18 barrels of coffee, belonging to the plaintiffs, and insured by the policy, and then lying in the warehouses at the Havannah, where they had been deposited when the ship was discharged. The expenses of the repairs of the ship were defrayed by the proceeds of the goods of the plaintiffs \*so sold, and the ship then proceeded on her voyage, and arrived in safety at her port of discharge in Europe, where the remainder of her cargo was duly delivered. The defendant paid to the plaintiffs the sum claimed as his contribution in respect of his subscription of the policy, as for a general average loss on the plaintiffs' goods insured as aforesaid.

*F. Pollock*, for the plaintiffs [referred to *Powell v. Gudgeon*<sup>†</sup> and argued that that case could not be supported].

*Campbell*, *contra*, was stopped by the COURT.

[ 10 ]

PER CURIAM :

The case of *Powell v. Gudgeon* was properly decided, and is expressly in point. The loss of the goods in this case did not arise from any peril of the sea. The sale of the goods was rendered necessary, not by the peril of the sea, but by the inability of the captain to find money in any other way to repair the ship. The mere interruption of the voyage will not entitle the assured to abandon. There must have been a total loss at some period of the voyage.

*Judgment for defendant.*

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1827.  
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[The plaintiff brought up the above judgment on error to the Exchequer Chamber.]

[ 4 Bing.  
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*F. Pollock*, who appeared on the part of the plaintiff below, admitted that this case was in all its circumstances the same as

<sup>†</sup> 17 R. R. 385 (5 M. & S. 431).

that of *Powell v. Gudgeon*,† in which it was holden that an underwriter on goods was not liable, where the goods were sold by the master of a ship to defray the expence of repairs rendered necessary by a tempest, to which the ship and goods had been exposed. He admitted the principle laid down by Lord ELLENBOROUGH in that case, that in considering the losses for which an insurer is liable, *causa proxima non remota spectatur*, but he urged that, both in the argument and judgment of that case, it was taken for granted that the tempest was not the proximate cause of the loss of the goods; and he now contended, that the tempest ought to be deemed the proximate cause, and not the sale. It \*was not necessary to constitute a loss, that the article should be destroyed: in *Idle v. Royal Exchange Assurance Company*,‡ it was holden there was a total loss, though the ship was afterwards sold. The loss, therefore, must be taken to occur when any thing happens which renders the further pursuit of the voyage unavailing. Where a cargo has been in such a state of peril as to justify abandonment, the assured may treat it as a total loss, and it is expressly found by the jury that, but for the repairs done, the ship could not have proceeded on her voyage; if so, the owners of the goods might have abandoned at the moment the ship was in her peril, and that must be deemed the moment of loss.

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*Campbell, contra*, was stopped.

BEST, Ch. J. :

The case has been argued with ingenuity, and has been put on a new point; but the rule laid down by Lord ELLENBOROUGH in *Powell v. Gudgeon*, *causa proxima non remota spectatur*, disposes of the question, for the perils of the sea were not the proximate cause of the sale of these goods. The counsel for the plaintiff below felt this, and, therefore, argued that the goods might be deemed to be lost when the owners might have abandoned.

But the doctrine of abandonment has been carried far enough. This ship was never in a state to be abandoned, because she was

† 17 R. R. 385 (5 M. & S. 431).

‡ 21 R. R. 538 (8 Taunt. 755; 3 Moore, 115).

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[ \*135 ]

afterwards repaired by the sale of a small part of her cargo. To extend the doctrine of abandonment to such a case as this, would render the business of insurance impracticable; it has only been applied to cases where the ship could not easily be repaired. Here, however, there has been no actual abandonment, and a total loss of the goods could never \*be said to have taken place while they were in a state in which they might have reached the consignees. It cannot be held, therefore, that these goods were lost when the peril happened at sea; and the effect of a decision which should overrule *Powell v. Gudgeon* would be unjust, inasmuch as it would throw on the insurer on goods a loss which ought to fall on the insurer on ship. The owner of the ship ought to furnish the captain with funds for repair; if he omits to do so, and the captain is obliged to sell the cargo, he whose goods are sold may claim the value of the owner; and the owner may sue the insurer on ship for the expence incurred in repair.

*Judgment affirmed.*

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June 4.

[ 2 B. & C. 23 ]

ATKINS AND OTHERS v. TREDGOLD AND OTHERS.†

(2 Barn. & Cress. 23—31; S. C. 3 Dowl. & Ry. 200; 1 L. J. K. B. 228.)

A. and B. made a joint and several promissory note. A. died, and ten years after his death B. paid interest upon the note. In an action brought upon the note against the executors of A., it was held that the payment of interest by B. did not take the case out of the Statute of Limitations, so as to make A.'s executors liable.

DECLARATION in assumpsit upon three promissory notes made by John Tredgold, deceased, and payable on demand to John Atkins, deceased. The first bore date the 17th January, 1806, and was for 300*l*. The second was for 200*l*., and bore the same date. The third was for 300*l*., and bore date the 17th January, 1809. There were counts for interest for money paid, lent and advanced, had and received, and upon an account stated between the two testators. In all these counts the promises were alleged to have been made by John Tredgold, deceased, to John Atkins. Another count stated that John Tredgold,

† Cited by STIRLING, J. in *Re* 544. And see *Mercantile Law Wolmershausen, Wolmershausen v. Amendment Act, 1856* (19 & 20 Vict. *Wolmershausen*, (1890) 62 L. T. 541, c. 97), s. 14.—R. C.

before his decease, was indebted to John Atkins, in his lifetime, for principal and interest upon the several promissory notes mentioned in the former counts, and for money lent and advanced, money had and received, money paid, laid out, and expended, and for money due and owing from Tredgold to John Atkins upon an account stated between them; and that John Tredgold, since deceased, in his lifetime, being so indebted, and the said several sums of money remaining wholly due and unpaid, the said defendants, as executors as aforesaid, after the death of Tredgold, and before the death of Atkins, promised Atkins to pay him the said sums of money, upon request. There was another count upon an account stated between the defendants as executors, and Atkins, and a \*promise by the defendants as executors to pay the sums then found to be due. The defendants pleaded, as to the first set of counts, that John Tredgold did not promise; upon which issue was joined. Secondly, to those counts that the cause of action did not accrue within six years; upon which issue was tendered and joined. And as to the promises in the latter set of counts, that the executors did not promise; upon which issue was joined. And further, as to the promises in those counts, that the defendants did not, within six years, promise; upon which issue was also tendered and joined. The defendant Knight also pleaded *ne unques executor*, upon which issue was tendered and joined; and also that no goods or chattels of the testator ever came to his hands to be administered; as to which the plaintiffs, in their replication, prayed judgment of assets *quando acciderint*. At the trial, before Abbott, Ch. J., at the London sittings after Trinity Term, 1822, the three promissory notes stated in the declaration were produced in evidence; by them, John Tredgold and Robert Tredgold jointly or severally promised to pay on demand the several sums therein mentioned. It appeared that Atkins had lent to Robert Tredgold the money for which the promissory notes were given, as securities; and that John Tredgold, who was the father of Robert Tredgold, only became a party to the notes as surety. John Tredgold died in March, 1810, and by his will made the defendants his executors. But defendant Knight did not prove the will or

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do any act as executor. It was proved that Robert Tredgold continued to pay interest on the notes after the death of his father, and that the last payment was made by him in May, 1816. It appeared by his books, produced in evidence, that these payments were made by him out of his private estate.

[ \*25 ] John Atkins died in September, 1816, \*and by his will appointed the plaintiffs his executors. Upon these facts the LORD CHIEF JUSTICE told the jury, that John Tredgold having died eleven years † before the commencement of the action, no express promise could have been made by him within six years; and therefore that the verdict upon the first set of counts must be for the defendants. And as to the question arising upon the pleas to the second set of counts, viz. whether there was any promise by the executors within the six years, he told the jury, that if they thought that the payments made by Robert Tredgold were made by him in his character of executor, they should find for the plaintiffs upon those counts. If, however, they thought the payments were made by him on his own account, as the joint maker of the notes, then they were to find for the defendants. The jury having found a verdict for the defendants, a rule *nisi* was obtained in last Michaelmas Term for a new trial, on the ground that the payment of interest within six years by Robert Tredgold, who was one of the joint makers of the note, even on his own account, was an admission of an existing debt due upon the note itself; and, upon the authority of *Whitcomb v. Whiting*,‡ took the case out of the statute, even against the representatives of the other joint promiser.

The *Solicitor-General* (with whom were *Scarlett* and *E. Laues*,) now shewed cause. \* \* \*

[ 26 ] *Gurney* and *Selwyn*, *contrà*. \* \* \*

[ 27 ] ABBOTT, Ch. J. :

I think the rule for a new trial must be discharged. The plaintiffs have in one set of counts declared upon three promis-

† The action was commenced in January 1822.

‡ Doug. 651.

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sory notes payable on demand, made by John Tredgold, in his lifetime, and the promise to pay is alleged to have been made by him. To those counts the defendants have pleaded, that John Tredgold did not promise within six years. It appeared in evidence that John Tredgold had died eleven years before the action was brought; and therefore no such promise could be made. Then there was another count, stating that John Tredgold was indebted upon the \*notes, and died leaving the monies unpaid; and that the defendants as executors, in consideration thereof, promised to pay; and there was also a count upon an account stated, and a promise by the executors. The question for the Court therefore is, whether any promise to pay has been made by the defendants as executors. I cannot agree with the argument, that the mere existence of a debt owing by the testator is evidence of a promise to pay by the executors as executors. There is certainly no authority for that position; and if that be so, then we must seek for evidence of that promise, aliunde. Now the evidence given was, that Robert Tredgold paid interest in 1816. The jury have found that he paid it in his own right, and not in the character of executor. There was not, therefore, any thing done by the executors, in that character; and that being so, I should feel a difficulty in saying that a case was made out on those counts, independently of the statute. But there is also a plea, that the defendants did not promise within six years. I think there is no evidence of a promise by all, and certainly not such as to take the case out of the Statute of Limitations. The evidence was, a payment of interest by Robert Tredgold in his own right. *Whitcomb v. Whiting*† was relied upon to shew that such payment would take the case out of the Statute of Limitations. It is not necessary to say whether that case, which is contrary to a former decision in *Ventris*,‡ would be sustained, if reconsidered; but I am warranted in saying, by what fell from Lord ELLENBOROUGH in *Brandram v. Wharton*,§ that it ought not to be extended. The payment was by one of several

[ \*23 ]

† Doug. 651.

§ 19 R. R. 354 (1 B. & Ald. 463).

‡ *Bland v. Hasebrig*, 2 Vent. 151.

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[ \*29 ]

originally liable. Here we are called upon to go further, and say, that a payment by one of several, liable *alieno jure*, shall raise an implied \*promise by them all. Such a decision would introduce great difficulty in administering the affairs of testators. Suppose an executor to have waited six years, and then no claim having been made, to dispose of the assets in payment of legacies. He might, if the plaintiffs were to prevail, be subsequently rendered liable to the payment of demands to any amount, by the acknowledgment of a person originally joint debtor with the testator. The inconvenience and hardship arising from such a liability satisfies me that the principle of *Whitcomb v. Whiting* ought not to be extended to this case. For these reasons I think this rule must be discharged.

BAYLEY, J. :

My opinion in this case is founded, not upon the case of *Pittam v. Foster*†, but upon independent grounds. The plaintiffs cannot take the case out of the statute, as to the first set of counts, because the testator had been dead ten years before the action was brought. But they seek to do that as to the other counts, by shewing an acknowledgment made by one of several who were liable; but that is not the legal effect of the payment made by Robert Tredgold. It is said, that a joint promiser having made a payment within six years, the executors of the other are liable; and the case of *Whitcomb v. Whiting* is relied upon. That is certainly a very strong case, and it may be questionable whether it does not go beyond proper legal limits. But that case is distinguishable from the present in two particulars. Here, the statute appears to have attached before the payment was made by Robert Tredgold; and therefore John Tredgold, being at that time protected, could not be subjected to any new obligation by the act of Robert. And, secondly, the parties sought to be charged in this \*action by means of an implied promise are not those originally liable, as was the case in *Whitcomb v. Whiting*. I entirely agree with my LORD CHIEF JUSTICE, that we ought not to extend the doctrine of that case to executors.

[ \*30 ]

† 25 R. R. 385 (1 B. & C. 248), cited in the argument.

HOLROYD, J. :

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I, also, am of opinion that the circumstances of this case do not take it out of the Statute of Limitations. *Whitcomb v. Whiting* is the only case that can be relied on by the plaintiffs. That case has gone far enough; but it does not govern the present. There, the defendant Whiting was liable, upon a joint promise, at the time when the payment was made. The Court decided, that when one of two joint promisers pays a part, that was to be considered in law as a payment by both. But here, at the time when the payment was made by Robert Tredgold the joint contract had ceased to exist; for it was determined by the death of John Tredgold. The note then became the several note of the parties to it. To hold such a payment to raise an implied promise sufficient to bind the defendants, would be to decide that, where the promises are several, a promise by one party would bind the rest. The plaintiffs cannot recover in this case, without proving a joint promise by the defendants, *as* executors; and in order to do that, the executorship must be proved, although that is unnecessary where the demand is founded on promises made by the testator; for then the plea *ne unques* executor must be proved by the party pleading it. One of the defendants was not proved to have done any act as executor. But it has been argued, that being named as such in the will he is liable, upon these pleadings, although he has never accepted the office. I much doubt that; but it is unnecessary to decide upon that ground, inasmuch as this case is distinguishable from *Whitcomb v. Whiting*, even if that be law. Here, at the time when the payment was made by Robert Tredgold, he was not connected in a joint contract either with John Tredgold or his executors. His separate character only remained.

[ \*31 ]

BEST, J. :

The counts on promises by the testator are disposed of by *Pittam v. Foster*. Then, as to the others, it is sufficient to say, that the implied promise not having been made by Robert Tredgold in the character of executor, it does not prove the issue.

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The present case is therefore distinguishable from *Whitcomb v. Whiting*; beyond which I think the Court ought not to go. The rule must, therefore, be discharged.

*Rule discharged.*

1823.  
June 5.  
[ 37 ]

### BALDEY AND ANOTHER v. PARKER.

(2 Barn. & Cress. 37—44; S. C. 3 Dowl. & Ry. 220; 1 L. J. K. B. 229.)

A. went to the shop of B. and Co., linendrapers, and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.* A separate price for each article was agreed upon; some A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them: Held, first, that this was all one contract, and therefore within the 17th section of the Statute of Frauds. Secondly, that there was no delivery and acceptance of any of the goods so as to take the case out of the operation of that section.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before Abbott, Ch. J. at the London sittings after Trinity Term, 1822, the following appeared to be the facts of the case. The plaintiffs are linendrapers, and the defendant came to their shop and bargained for various articles. A separate price was agreed upon for each, and no one article was of the value of 10*l.* Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. A bill of parcels was accordingly made out and sent by a shopman. The amount of the goods was 70*l.* The defendant looked at the account, and asked what discount would be allowed for ready money, and was told 5*l.* per cent.; he replied that it was too little, and requested to see the person of whom he bought the \*goods, (Baldey) as he could bargain with him respecting the discount, and said that he ought to be allowed 20*l.* per cent. The goods were afterwards sent to the defendant's house, and he refused to accept them. The LORD CHIEF JUSTICE thought that this was a contract for goods of more than the value of 10*l.* within the meaning of the seventeenth section of the Statute of Frauds, and not within any of the exceptions there

[ \*38 ]

mentioned, and directed a nonsuit; but gave the plaintiffs leave to move to enter a verdict in their favour for 70*l*. A rule having accordingly been obtained for that purpose [and argued].

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ABBOTT, Ch. J. :

[ 40 ]

We have given our opinion upon more than one occasion, that the 29 Car. II. c. 3, is a highly beneficial and remedial statute. We are therefore bound so to construe it as to further the object and intention of the Legislature, which was the prevention of fraud. It appeared from the facts of this case, that the defendant went into the plaintiff's shop and bargained for various articles. Some were severed from a larger bulk, and some he marked in order to satisfy himself that the same were afterwards sent home to him. The \*first question is, whether this was one entire contract for the sale of all the goods. By holding that it was not, we should entirely defeat the object of the statute. For then persons intending to buy many articles at one time, amounting in the whole to a large price, might withdraw the case from the operation of the statute by making a separate bargain for each article. Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles. The plaintiffs therefore cannot maintain this action unless they can shew that the case is within the exception of the 29 Car. II. c. 3, s. 17. Now the words of that exception are peculiar, "except the buyer shall accept part of the goods so sold, and actually receive the same." It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer. If we held that such a transfer and acceptance were complete in this case, it would seem to follow as a necessary consequence that the vendee might maintain trover without paying for the goods, and leave the vendor to this action for the price. Such a doctrine would be highly injurious to trade, and it is satisfactory to find that the law warrants us in saying that this transaction had no such effect.

[ \*41 ]

BAYLEY, J. :

The buyer cannot be considered to have actually received the goods, when they have remained from first to last in the

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[ \*42 ]

possession of the seller. The plaintiffs are not assisted by the exception in the seventeenth section of the Statute of Frauds. Then the question is, whether there was a separate contract for each article. The 29 Car. II. c. 3, was passed to guard \*against frauds and perjuries ; and it must be collected from the seventeenth section, that the Legislature thought that a contract to the extent of 10*l.* might be sufficient to induce the parties to it to bring tainted evidence into Court. Now it is conceded here, that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than 10*l.* Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than 10*l.* within the seventeenth section of the statute ; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law. It has been asked, what interval of time must elapse between the purchase of different articles in order to make the contract separate, and the case has been put of a purchaser leaving a shop after making one purchase and returning after an interval of five or ten minutes, and making another. If the return to the shop were soon enough to warrant a supposition that the whole was intended to be one transaction, I should hold it one entire contract within the meaning of the statute. I am therefore of opinion that this rule must be discharged.

HOLBOYD, J. :

[ \*43 ]

I am of the same opinion. The intention of the statute was that certain requisites should be observed in all contracts for the sale of goods for the price of 10*l.* and upwards. This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than 10*l.*, but in the course of the dealing it grew to a contract for a much larger amount. At last therefore it was one entire \*contract withing the meaning and mischief of the Statute of Frauds, it being the intention of that statute that where the contract, either at the commencement or at the conclusion, amounted to or exceeded the value of 10*l.* it should not bind unless the requisites

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there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l.* as if it had been originally of that amount. It must therefore be considered as one contract within the meaning of the Act. With respect to the exception in the seventeenth section, it may perhaps have been the intention of the Legislature to guard against mistake, where the parties mean honestly, as well as against wilful fraud; and the things required to be done will have the effect of answering both those ends. The words are, "except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." Each of those particulars either shews the bargain to be complete, or still further, that it has been actually in part performed. The change of possession does not in ordinary cases take place until the completion of the bargain: part payment also shews the completion of it; and in like manner a note or memorandum in writing signed by the parties plainly proves that they understood the terms upon which they were dealing, and meant finally to bind themselves by the contract therein stated. In the present case there is nothing to shew that some further arrangement might not remain unsettled after the price \*for each article had been agreed upon. There was neither note nor memorandum in writing; no part of the price was paid, nor was there any such change of possession as that contemplated by the statute. Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.

[ \*44 ]

BEST, J. :

It was formerly considered that a delivery of the goods by the seller was sufficient to take a case out of the seventeenth section



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of the Statute of Frauds; but it is now clearly settled, that there must be an acceptance by the buyer, as well as a delivery by the seller. The statute enacts, that where the bargain is for something to the value of 10*l.* it shall not bind, unless something unequivocal has been done to shew that the contract is complete. Nothing of that kind having been done in this case, if the dealing is to be considered as one entire transaction, it is clear that the plaintiffs cannot recover: whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account. It is therefore very distinguishable from *Emmerson v. Heelis* †, where a complete bargain was made as to each article, as soon as the auctioneer had signed his name to it.

*Rule discharged.*

1823.  
June 9.

[ 54 ]

### THE KING · v. JOLIFFE.

(2 Barn. & Cress. 54—64; S. C. 3 Dowl. & Ry. 240; 1 L. J. K. B. 232.)

A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom. A custom for the steward of a court leet to nominate certain persons to the bailiff, to be summoned on the jury, is a good custom.

*QUO WARRANTO*, calling upon the defendant to shew upon what authority he claimed to exercise the office of mayor of the borough of Petersfield. Plea, that Petersfield is an ancient borough; and that from time immemorial, there hath been a court leet or view of frankpledge holden in and for the borough on, &c.; and that the jury sworn and serving at that court, have presented a fit person to be mayor of the borough for one whole year; and that the person so presented hath always been sworn in at that court before the steward, and being so presented and sworn, hath executed the office of mayor for one year: that, at the court leet duly holden on, &c. certain persons (naming them), good and lawful men, &c. were then and there duly sworn, as and for the jury, then and there to serve as the jury, and did serve as the jury at the said court, and being so sworn, and so

† 11 R. R. 520 (2 Taunt. 38).

serving, presented defendant to be mayor: and that he being so presented, was duly sworn before the steward, and by virtue of the premises claimed to be mayor. To this plea there were eighteen replications, but the eighth only was material, viz. that the court leet of the said borough have immemorially presented a fit person to be bailiff, who is always attendant upon the court. That, at the Court mentioned in the plea, the steward nominated the fourteen persons mentioned in the plea, who served on the jury, and issued his precept to the bailiff to summon those persons; and that the bailiff did accordingly summon them: \*whereas, by the law of the land, the steward should have issued his precept to the bailiff to summon a jury, and the particular persons should have been selected by the bailiff. Rejoinder, that from time immemorial the steward has been used to nominate the jurors. Issue thereon. At the trial before Burrough, J., at the last Summer Assizes for the county of Hampshire, the defendant proved that for more than twenty years the precept to the bailiff had always contained a list of persons whom the steward directed him to summon as jurors. No evidence was given for the Crown to shew that any other practice had ever prevailed in the borough. The learned Judge told the jury, that slight evidence, if uncontradicted, became cogent proof; and they found a verdict for the defendant. In Michaelmas Term *Pell*, Serjt. obtained a rule *nisi* for a new trial, on the ground that there was not sufficient evidence to warrant the finding of the jury; or to enter judgment for the Crown, *non obstante veredicto*, on the ground that the custom set out in the rejoinder was bad in law.

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[ \*55 ]

*Scarlett, Adam, C. F. Williams, and Mereweather*, shewed cause:

The evidence was quite sufficient to warrant the finding of the jury. The commencement of the practice was not shewn; and therefore, in the absence of any proof to the contrary, it must be presumed that the custom, which had existed for more than twenty years, had existed from time immemorial. Indeed, all the evidence being for the defendant, a verdict for the Crown must have been wrong. As to the second point, it is only necessary to advert to the nature of the court leet, in order to

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[ \*56 ]

shew that there is no ground for this application. The court leet is derived from the \*sheriff's tourn, and its jurisdiction is the same.† In the tourn the sheriff is judge, and nominates the jury; in the leet the steward is in the place of the sheriff: why then should he not exercise the same power? At common law, all resiants were bound to attend the court without summons; and when they were assembled, the sheriff nominated a jury. If in order to secure a sufficient attendance, he sent his bailiff to summon the resiants, there was nothing illegal in that; and he might select the jury from those summoned. In the leet the rules were the same; and the steward, in case of a deficiency, might even swear on the jury a stranger happening to be present.‡ Suppose, instead of desiring the bailiff to summon certain persons, he had ordered him to summon all resiants; when they came, the steward certainly would be the proper person to nominate the jury. Indeed the law does not recognize a sheriff's bailiff, but considers all the acts of the latter as done by the sheriff himself. In many instances besides the tourn, the sheriff nominates the jury and presides as judge; as in writs of re-disseisin and writs of inquiry. In this particular case the steward was manifestly more independent than the bailiff, for the latter is annually elected by the leet jury: it would therefore be very singular if he were to be entrusted with the selection of that jury. *Crane v. Holland* § shews, that *by custom* the same person may summon the jury and act as judge; and here such a custom is found to have existed from time immemorial. There is not, therefore, any pretence for entering judgment for the Crown.

[ 57 ]

*Pell, Serjt., Gaselee, Coltman, and Carter, contra :*

It was incumbent on the defendant at the trial to prove, that a custom for the steward to nominate the jury had existed from time immemorial. The mere practice for twenty years past was insufficient to raise such a presumption, or to justify the opinion expressed by the learned Judge, that such evidence upon such an issue was cogent proof. But whatever may be the opinion of the Court upon that point, the custom itself is unreasonable and bad.

† Com. Dig. Leet (B) [and see Pollock & Maitland, History of English Law, i. 568].

‡ 1 Roll. Abr. Court (Y), pl. 1.  
§ Cro. Car. 138.

The 1 Ric. III. c. 4,<sup>†</sup> shews that the bailiff is the proper officer to appoint the jury, for it imposes a penalty upon him for returning improper persons. Now he could have no power over the return if merely a summoning officer. The 11 Hen. IV. c. 9,<sup>‡</sup> does not in terms apply to courts leet, but it does in principle; and enacts that the bailiffs of franchises are to return the inquest, without the nomination of any.

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(HOLROYD, J.: That Act does not take away from any the authority which they had before.)

The precedent given by SCROGGES, Ch. J. for a precept to the bailiff for assembling the Court, shews that the bailiff is the proper person to select the jury. §

(ABBOTT, Ch. J.: All your argument proceeds upon this ground, that because the thing may be done in one way, it cannot be done in any other.)

If the nature and jurisdiction of the court leet are considered, it will be found that the bailiff not only *may*, but *must* select the jury. At common law it had jurisdiction over all capital offences except homicide; and although that power has been restrained by Mag. Car. c. 17, and Weston, 2, c. 13, still, if the custom here set up be good now, it must have been good before the \*passing of those statutes. But it cannot be reasonable that the judge of a criminal court having such ample jurisdiction, should have the power to select the jury and decide upon the challenges.

[ \*58 ]

(ABBOTT, Ch. J.: The leet jury is rather in the nature of a grand jury.)

Still the argument applies, unless it be supposed that in former times the grand and traverse juries were returned by different persons. There could be no challenge to the array, for that can only be on the ground of un-indifferency in the returning officer. Such is the consequence of the sheriff being judge in re-

<sup>†</sup> Repealed 6 Geo. 4, c. 50.

<sup>‡</sup> Repealed S. L. B. 1863.

§ See Scriven on Copyhold Tenures, &c., vol. ii. p. 39.

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disseisin: Fitz. Nat. Brev. 188 n. That the bailiff is the proper officer also appears from the *Prior of Montague's* case,<sup>†</sup> recognised in Roll's Abr.,<sup>‡</sup> and Brook's Abr.,<sup>§</sup> where the charge against the defendant (a bailiff) was, not that *by custom* he was bound to return the panel, but that he was the proper common-law officer to perform that duty, and had neglected it; and in Hawk. P.C. || it is said, that the sheriff may fine the bailiff for refusing to make a panel, which would be absurd, if the bailiff were not the proper person to execute that duty. The only instances in which power is given to a judge to interfere with the nomination of a jury, are by 8 Hen. VIII. c. 12,<sup>¶</sup> which enables him to re-form a panel in open court, and 1 Eliz. c. 17, s. 10, which gives power to summon a second jury to proceed instantly in case of improper conduct in the first. In re-disseisin, which has been mentioned, the sheriff and coroner are judges, not the sheriff alone. Besides, the sheriff is a public officer responsible to the Crown; whereas the steward is the creature of the lord, \*who is entitled to all fines and amercements. In *Wood v. Lovatt*†† it was decided, that a custom for the court leet to amerce for a private inquiry done to the lord was bad, for that would make him judge in his own case. Here, the steward presides in the place of the lord; and if he could select the jury who are to make presentments and impose amercements, the lord, being entitled to them, would virtually be judge in his own case. A custom producing that effect is therefore unreasonable and void.

[\*59]

ABBOTT, Ch. J.:

I am of opinion that this rule must be discharged. There is not any ground for a new trial. Upon the evidence given, uncontradicted, and unexplained, I think the learned Judge did right in telling the jury that it was cogent evidence, upon which they might find the issue in the affirmative. If his expression had gone even beyond that, and had *recommended* them to find such a verdict, I should have thought that the recommendation was fit and proper. A regular usage for twenty years, not explained or contradicted, is that upon which many private and

† 7 Hen. VI. 12 b.

‡ 219, Y. pl. 2.

§ Leet, 14.

|| B. 2, c. 10, s. 15, 7th edit.

¶ Repealed 6 Geo. 4, c. 50.

†† 6 T. R. 511.

public rights are held, there being nothing in the usage to contravene the public policy. Taking, therefore, the issue to be properly found, we must consider that by the immemorial custom of this court leet the steward has been in the habit of pointing out to the bailiff the persons who are to be summoned on the jury. If that custom be against any known rule or principle of law, it cannot stand, however great its antiquity may be. But I am of opinion that it is not; and I adopt in a great degree what has been said respecting the ancient constitution \*and practice of the tourn and leet. All residents were bound to attend, and many did attend; and not till they were assembled was any jury selected. Then the sheriff in the one case, and the steward in the other, named to his officer the persons who were to be impanelled, and to serve on the jury. If it were the ancient practice to select a jury in that mode without summons, there does not appear to be any sound reason why certain persons should not be summoned to serve as jurors. Various Acts of Parliament† have been referred to, as shewing something inconsistent with this. The first of them is 11 Hen. IV. c. 9. By that it appears that a practice had crept in for other persons than the sheriff or bailiff of a franchise to nominate to the Judges those who should serve on the grand juries, which was found very mischievous. It was therefore provided by that Act, that none should serve but those who were returned to the judges by the sheriff or bailiff, without the nomination of any other person. Then came the 1 Ric. III. c. 4, whereby it was enacted in sec. 1, “that if the bailiff should return or impanel to serve as jurors in the tourn any persons not having the qualification there mentioned, he should forfeit 40s. ;” and by sec. 2 a similar fine is imposed on the sheriff. Now, put this case: The bailiff impanels persons not duly qualified; is the sheriff to allow them to serve, and so incur the fine, or to leave the business of the tourn undone; or, is he to select others who are duly qualified? No doubt the latter would be the proper course. Allusion has also been made to the 3 Hen. VIII. c. 12. That statute gives power to justices of gaol delivery to amend a panel precisely in

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[ \*60 ]

† The subsequent repeal of these Acts makes no difference to the argument.—R. C.

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[ \*61 ]

the manner in which I think the sheriff ought to do in his tourn, under the circumstances before supposed. \*The case of *Crane v. Holland*, which has been cited, also shews that the same person may, *by custom*, be the judge of a court for one purpose, and the officer for another. But a passage in Hawk. P. C. b. 2, c. 10, s. 15, has been relied upon as shewing that the bailiff is to select the jury, because the sheriff may fine him for not making a panel. But there is nothing inconsistent in saying that it is the bailiff's duty to make the panel, although the sheriff decides upon the persons to be named in it. There is also another answer to the argument, viz. that the passage may refer to the traverse jury, and not the grand inquest. In other cases, as in writs of inquiry and re-disseisin, the sheriff nominates the jury, and presides as judge: can we then say that there is anything in the custom now under consideration, which is at variance with any known rule or principle of law? The usual mode may be different, but that is the whole argument; and to infer thence that no other mode can be legal, is not consistent either with good logic or good law. Upon the whole, therefore, I am of opinion that there is nothing unreasonable or illegal in this custom, which has been established by the verdict, and that the judgment ought not to be entered for the Crown.

HOLROYD, J. : †

[ \*62 ]

I am of opinion that the observations of the learned Judge, and the verdict of the jury, were well warranted by the evidence in the cause. The remaining question is, whether the custom found be contrary to law, and therefore void. The common and ordinary course is for the bailiff to nominate the jury; \*and, in the absence of any custom to the contrary, that would be held to be a part of his duty. But here it is found that a custom has immemorially existed for the steward, and not the bailiff, to nominate the jury. It appears to me that the authorities which have been cited, and the usage which has prevailed on writs of inquiry, and in some other instances, establish clearly that the custom is not inconsistent with any principle of law.

† Bayley, J. had left the Court.

The statute 3 Hen. VIII. c. 12, giving Judges the power to amend panels, shews that the Legislature did not think it against the principles of law, that Judges should interfere with the nomination of the persons who were to serve. Unless then some Act of Parliament can be found depriving the steward of such a privilege as that now claimed, it is plain that he may enjoy it. The 11 Hen. IV. c. 9, is the only one that at all bears upon the question; but that was intended to remedy the abuse which had been introduced of nominations by persons without any authority, and was not meant to apply to such cases as this. The latter part of it runs thus: "And that from henceforth no indictment be made by any such persons but by inquest of the King's lawful liege people, in the manner as was used in the time of his noble progenitors, returned by the sheriffs or bailiffs of franchises, without any denomination to the sheriffs or bailiffs of franchises before made by any person of the names which by them should be impannelled; except it be by the officer of the said sheriffs or bailiffs of franchises, sworn and known to make the same, and other officer to whom it pertaineth to make the same according to the law of England." In this case, by the custom which existed before the time of legal memory, and therefore by the law of England, it pertained to the steward to nominate the jury. The *\*case of Crane v. Holland* is, I think, decisive of the principle; for it is there held that one may be judge and officer, *diversis respectibus*. For these reasons, I am of opinion that the rule must be discharged.

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[ \*63 ]

BEST, J.:

We are not called upon to lay down any general rule in this case, but merely to say whether the special immemorial custom found by the jury be or be not consistent with the principles of law. No direct authority has been cited to shew that the custom is bad. The form given by SCROOGES, Ch. J., by which it appears that the bailiff usually selects the jury, may prove what the general practice is, but does not impugn the custom. The only other case cited at the Bar, *Crane v. Holland*, is in support of the custom. It was there held, that in a corporation the bailiffs



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might *by custom* be both judges and ministerial officers of the court. An attempt was made to show that this case differed from that and the cases where the sheriff presides as judge, because here the lord is entitled to the fines and amercements; but that argument, if valid, would also show that the sheriff cannot properly select the jury in such cases, because he is appointed by the crown, to which the fines imposed in his court belong. So also in corporations, the fines for the most part belong to the body corporate, and yet the mayor and the corporation sit as judges in the corporate courts and impose fines. Of the statutes which have been referred to, one only appears to touch the question, and that furnishes an answer to this application. It is true that the 11 Hen. IV. c. 9 says, that jurors in indictments shall be returned by the sheriffs or bailiffs, because these are the officers whose duty it is in general to return them; but \*this statute was not intended to prevent any other properly authorised officer from returning jurors, but only such as were not officers of the court from nominating persons to the court to serve as jurors. The 1 Ric. III. c. 4, only provides for the return of jurors who were properly qualified, and makes no regulation as to the returning officer. It speaks of bailiffs and other officers. But the 1 Eliz. c. 17, which gives the steward of a leet a power to nominate a second jury in case of misconduct in the first, warrants us in saying that a custom for the steward to nominate the first is not unreasonable or illegal. The Legislature would not have directed the steward to nominate the second jury if it had considered him as so dependant on the lord who is to receive the fines imposed in the court, as not fit to be trusted to return the jury who are to impose them. This, therefore, is a complete answer to the only objection that appears to me to be even specious. If the steward be a proper person to name the second jury, he cannot be so unfit to return the first, as to make an immemorial custom, that he is to return the jury at the leet, bad in point of law.

[ \*64 ]

*Rule discharged.*

SIMSON AND OTHERS *v.* INGHAM AND OTHERS.†

(2 Barn. &amp; Cress. 65—76; S. C. 3 Dowl. &amp; Ry. 249; 1 L. J. K. B. 234.)

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[ 65 ]

A bond was given by country bankers to the several persons constituting the firm of a London banking-house, conditioned for remitting money to provide for bills, and for the repayment of such sums as the London bankers might advance on account of persons constituting the firm of the country banking-house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the London bankers. It was the course of business between the two houses for the London bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the London bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country bankers to an equal amount. In the first instance the London bankers entered in their books all receipts and payments made after the death of the deceased partner to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts; one the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts subsequent to that time: Held, that the entries in the books of the London bankers did not amount to a complete appropriation by them of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it; and therefore that the London bankers, notwithstanding those entries, were entitled to apply the payments received subsequently to the death of the deceased partner to the debt of the new firm.

THIS was an action against the defendants, as heirs and devisees of Benjamin Ingham, deceased, on a bond bearing date the 19th October, 1808; whereby Benjamin and Joshua Ingham, since deceased, therein described as late of Huddersfield, bankers, became bound in the penal sum of 20,000*l.* to one P. C. Bruce, and the three plaintiffs, Simson, Stephenson, and Freen, therein described as bankers in London, carrying on business under the firm of Were Bruce, Simson & Co. The condition of the bond was, that B. and J. Ingham should well and truly remit and pay to the said P. C. Bruce, Simson, Stephenson and Freen, or any

† Cited and followed by BLACKBURN, J., in his judgment in *City Discount Co. v. McLean* (Ex. Ch. 1874) L. R. 9 C. P. 692, 700, 43 L. J. C. P. 344, and by same judge in

*Hooper v. Keay* (1875) 1 Q. B. D. 178, 181. And in judgment of Judicial Committee in *Prince v. Oriental Bank Corporation* (1878) 3 App. Cas. 325, 332, 47 L. J. P. C. 42.—B. C.

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of them, associated or not with any other person or persons in \*the same or any firm, the amount of all such sums as B. and J. Ingham, or either of them, associated with any other person or persons or not, should draw on the said Bruce, Simson, Stevenson and Freen, or any of them, associated or not as aforesaid, or make payable at their house, as the said bills or notes should become respectively due. There then followed other clauses, usual in such bonds, for payment of all monies paid, laid out, and expended by the London bankers, on account of the country bankers, or due from the latter to the former, upon any account whatever.

The defendants pleaded separately, and admitted the execution of the bond by Benjamin Ingham, and set out the estates which they severally took under the obligor, which the plaintiffs confessed to be accurately set out. The plaintiffs suggested breaches of the condition of the bond, and the writ of enquiry came on to be executed before the Lord Chief Justice, at the London sittings after Easter Term, 1822, when the amount of the damages was referred to Mr. Gaselee, who, by his award reciting the bond and the order of reference, assessed them at 13,845*l.*, but stated the following facts for the opinion of the Court.

[ \*67 ] The obligors are bankers at Huddersfield; the obligees their London correspondents. At the date of the bond, and from thence to the 1st January, 1809, the Huddersfield bank was carried on by the obligors alone. On that day John Ikin was taken into the firm, and it so continued until the 14th September, 1811, when Benjamin Ingham died. The two survivors carried on the Huddersfield bank till January, 1814, when Joshua Ingham died. From the time Ikin was taken into the partnership until and at the death of Joshua, the firm was \*called Messrs. Benjamin and Joshua Ingham & Co. The house of Bruce, Simson & Co. was carried on by the four obligees till the 31st December, 1808, when Stephenson retired. The other three continued by themselves till the 1st January, 1811, when they took in Harry Mackenzie; and it was continued by Bruce, Simson, Freen and Mackenzie, till after the death of Joshua Ingham. During the latter period this firm was sometimes called Bruce, Simson & Co., and sometimes Bruce, Simson,

Freen & Co. The house of Bruce & Co. were in the habit of sending to the Huddersfield bank monthly statements of their accounts. Such statements were generally sent within the first ten or twelve days of the succeeding month ; and were, on their arrival at Huddersfield, examined, and the sums ticked by a clerk of that bank, and also looked over by Ikin, to whom the Inghams chiefly left the management of the business. The last statement, sent previously to the death of Benjamin Ingham, was for the month of August, 1811, and was sent on the 11th of September, in that year. The balance of that account was 23,671*l.* 3*s.* 2*d.* in favour of Bruce & Co. On the 16th September, when the news of Benjamin Ingham's death reached Bruce & Co., the balance in their favour was 22,723*l.* 5*s.* 3*d.* On the 14th, the day on which Benjamin Ingham died, it was something less ; but on the 16th had increased to the above sum by the addition of some bills for which the Inghams had had credit, and which were returned on that day dishonoured. No alteration in the account was made in the books of Bruce & Co. immediately on the death of Benjamin Ingham ; but, during the residue of the month of September and a part of the month of October, the remittances \*made by the Huddersfield bank, and the payments made by Bruce & Co. on their account, were entered in continuation of the former account. The remittances and payments during that time were nearly equal, and both far exceeded the balance due at the death of Benjamin Ingham ; and if by having thus continued the account Bruce & Co. are to be considered as having made an election from which they are not at liberty to depart, and bound to apply the earliest remittances in discharge of the former balance, the damages are to be only nominal. Before, however, any account was transmitted to the Huddersfield bank subsequent to that for August, Bruce & Co., in consequence of a communication with their solicitor, opened a new account in their books, and in that inserted all the remittances and payments made subsequent to the death of Benjamin Ingham, striking them out of the former account, and retaining in the old account only the bills for which, as before stated, credit had been given, but which had been returned dishonoured ; and on the 13th November, 1811, they transmitted to the

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Huddersfield bank statements of two accounts, each of which, instead of comprising, as formerly, the transactions of a single month, contained those of two, viz. September and October, no account of September separately having been sent.

[ \*69 ] The first of these accounts was thus entitled : “ Debtors Messrs. B. and J. Ingham & Co. (old account), in account with Bruce, Simson & Co., creditors.” The first item on the debit side of this account was the former balance of 23,671*l.* 3*s.* 2*d.*, and it contained the remittances and payments in September up to the death of Benjamin, and the bills returned on the 16th, making the above balance of 22,723*l.* 5*s.* 3*d.* Under \*this was a similar list of bills returned dishonoured in October, which increased the balance to 23,118*l.* 13*s.* The second account was in the same form, but entitled “ new account,” and the word “ Freen ” was introduced after Simson. This account began on the 16th September, without any balance brought forward, and contained the remittances and payments made during that month, subsequent to the death of Benjamin, and also those made in the month of October. The balance of that account, at the end of September, was 965*l.* 15*s.* 8*d.* in favour of the Huddersfield bank ; but at the end of October was 242*l.* 12*s.* 7*d.* in favour of Bruce & Co. These accounts were examined and ticked in the usual manner by the clerk of the Huddersfield bank. From this time the old and new accounts were kept separate in the books of Bruce & Co. : the addition to the former being little, if anything, more than the interest at the end of every six months, except in the month of July, 1813, when a transfer was made from the new account to the old of 15,507*l.* 18*s.* 10*d.*, which reduced the balance of the old to 10,000*l.* Statements of these two accounts continued to be from time to time transmitted by Bruce & Co. to the Huddersfield bank, and examined and ticked in the usual manner, except that the statement of the old account was only sent at the end of every six months. The Huddersfield bank do not appear to have ever objected to the accounts being kept separately by Bruce & Co., although in their own books they only kept one account. The arbitrator being of opinion that, under these circumstances, the balance due on the death of Benjamin Ingham was not wholly discharged, assessed the damages at the

sum above awarded; but if the Court should be of opinion that \*the damages ought only to be nominal, then he directed that they should be reduced to the sum of one shilling. Upon the motion for a rule to reduce the damages to one shilling, in last Michaelmas Term, the Court ordered that the award should be turned into a special case.

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[ \*70 ]

*Campbell, for the plaintiffs :*

The remittances after Benjamin Ingham's death having been made generally, the plaintiffs had a right to appropriate them to the debts contracted by the new firm. In *Clayton's case*,† *Bodenham v. Purchas*,‡ and *Brooke v. Enderby*,§ the expressions of the Judges have reference to the fact of there having been one continuous account for all the transactions before and after the change of the firm. This is evidence of the party receiving the money having applied it to the payment of the earliest items of the account. But it is impossible to contend that a rest may not be made and a new account opened. The deceased or retiring partner may be indebted to the partnership, and there can be no right that the old debt should be satisfied by money of the remaining partners. The question here must therefore turn upon the effect to be given to the entries in the plaintiffs' books before the new account was opened. But these entries never having been communicated, would have been no evidence of an appropriation for the plaintiffs themselves, and are to be considered as of no validity with respect to others. *Manning v. Western*,|| *Cox v. Trøy*.¶ The meaning of an appropriation by the receiver at the time of payment is, that he shall appropriate on the first \*occasion of there being any communication between him and the payer, and this course was here pursued; for in the first account rendered after Benjamin Ingham's death, the subsequent payments were appropriated to the new debt, and the old debt remains unsatisfied. He was then stopped by the Court.

[ \*71 ]

† 15 B. R. 161 (1 Mer. 572).

|| 2 Vern. 607.

‡ 20 B. R. 342 (2 B. & Ald. 39).

¶ 24 B. R. 460 (5 B. & Ald. 474;

§ 22 B. R. 653 (2 Brod. & Bing. 70). 1 Dowl. & Ry. 38).

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*F. Pollock, contra :*

The London bankers were bound to apply the payments at the time of receiving them. That is expressly laid down by the MASTER OF THE ROLLS in *Clayton's* case.† After observing that the rule with regard to the option given in the first place to the debtor, and to the creditor in the second, was taken from the civil law, he proceeds to state that, according to that law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor ; and he then cites the words of the civil law, “in re præsentī ; hoc est statim atque solutum est : cæterum postea non permittitur.”‡ The rule laid down refers to an act of appropriation to be done either by the party paying or receiving the money. The party paying money is bound to communicate his intention that it shall be applied in payment of a particular debt to the party receiving it ; for otherwise the right of appropriation would devolve upon the creditor. The very act of communicating the intention is the act of appropriation. But where a creditor receives money without any appropriation by the debtor, the right of applying it in payment of any one of several debts devolves on the former. The appropriation is an act to be done by him only, and it is unnecessary that it should be communicated \*to the debtor : for the latter not having made his election in the first instance, has no right to dissent from the appropriation made by the creditor. Here, therefore, the London bankers did, at the time of receiving the several payments, make the appropriation by entering them in their own books to the account of the old firm. The making of these entries constituted the act of appropriation ; and having once done that act, they had no right to make any alteration in the account, especially to the prejudice of the heirs and devisees of B. Ingham, who are mere sureties for any debts contracted by the new firm since his death.

[ \*72 ]

BAYLEY, J. : §

The general rule is that the party who pays money has a right

† 15 R. R. 164 (1 Mer. 603).

§ Abbott, Ch. J. was absent.

‡ Dig. lib. 46, tit. 3, qu. 1, 3.

to apply that payment as he thinks fit. If there are several debts due from him he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. In this case the \*partner died in September, 1814. If, in the ordinary course of business, in October, 1814, a monthly account had been sent in, stating the transactions before and after the death of the partner as forming part of one entire account, and the balance as due from the survivors, in that case the creditor would have been precluded, and would have had no right to have said that the payments made subsequently to the death of the partner should be applied to any but the old account. In fact, the bankers in London did not send in any account after the death of the partner until November, and then they sent in two distinct accounts; one made up to the day of the death of the partner, and the other commencing from that period. At that time, therefore, the bankers in London expressed their dissent from making the whole one entire account. It has been insisted that at that period of time they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes are not conclusive on him until he has made a communication on the subject of those entries to the opposite party.

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Until that time he continues to have the option of applying the several payments as he thinks fit. For these reasons I am of opinion that the plaintiffs were not precluded from applying the payments to the new account, and therefore that this award is right.

[ 74 ]      HOLROYD, J. :

I am also of opinion that in this case the award is right. The persons paying the money not having made any direct application of it, the right of making such application devolved on the receivers; and if they have done no act which can be considered as such an application, it is equally clear that although they did not apply it at the moment of payment, they would have a right to make the application at a subsequent period. The question therefore is, whether from any entry in the books there appears to have been a complete election by them to apply the payments in any other way than they are applied in the accounts which have been actually delivered. Now, those entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books shows only that the idea of so applying the payments had passed in their own minds. It is much the same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect. In the case of *Cox v. Troy*, a party who had written his acceptance with the intention of accepting a bill afterwards changed his mind, and before it was communicated to the holder, or the bill delivered back, obliterated his acceptance; and it was held that the acceptance was not complete. That case is very similar to the present; for the drawer of the bill there, by writing his acceptance on it, had expressed an intention to accept, yet it was held not to be a complete acceptance until it was communicated to the holder. So in this case, the entries made in the bankers' books could not amount to an election by them to appropriate the \*sums to a particular account until those entries were communicated to the opposite party. That being so, I am of opinion that the bankers

[ \*75 ]

are not bound by those entries, and therefore that the award is right.

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BEST, J. :

*Clayton's* case is altogether unlike the present. He had money in the banking-house at the time of Devaynes's death and afterwards paid in more money, which was blended in the same account. It was on the ground that the accounts were so blended that the MASTER OF THE ROLLS decided that case. He thought there was no other appropriation than what arose from the order in which the receipts and payments took place, and, according to that order, the money lodged in the house in Devaynes's lifetime was first paid. In this case the payments after the death of Benjamin Ingham are appropriated by the rendering of the accounts, in which credit is given for them to the surviving partners, from whose hands these payments came. But it is said that this application of the money was made too late, and after the plaintiffs were precluded from so applying them, by their having previously entered them to the credit of the old firm. It is true that Sir WILLIAM GRANT says, in *Clayton's* case, that, by the civil law, the application is given first to the debtor, and then to the creditor, and that as well the creditor as the debtor must make his election at the time of payment; and that unless such election be immediately made, the law will appropriate it in discharge of the most burthensome, and if all are equally burthensome of the oldest debts. But according to the cases there cited our law does not require from the creditor an instant decision. I think that he has a reasonable time \*to decide to which account he will place a sum that has been paid him without any application of it by his debtor, and more than a reasonable time has not been taken by the plaintiffs. When once the creditor has made his election he is bound by it. For the reasons given by my brothers, I think no election was made until the account was rendered to the Huddersfield bankers, and consequently that the award is right.

[ \*76 ]

*Judgment for the plaintiffs.*

1823.  
June 13.

[ 82 ]

MURRAY, ADMINISTRATOR OF W. MURRAY DECEASED,  
v. THE EARL OF STAIR.†

(2 B. & C. 82—95; S. C. 3 Dowl. & Ry. 278.)

A subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution, it was agreed that it should remain in his (the subscribing witness's) hands until the death of A. B., and until certain securities were given up, and that the bond was given up to him upon that condition: Held, that it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. B., and until the notes were delivered up.

Semle, That it is not essential in order that an instrument should operate as an escrow only, that it should be expressly declared at the time when it is executed, that it was not to operate as a deed until a given event happened.

[ \*83 ]

DECLARATION on a bond, bearing date the 3rd November, 1813, given to the deceased in the penal sum of 4,000*l.* Plea, craving oyer of the bond, and of the condition, which was for the payment to William Murray, his executors, &c., of 2,000*l.*, by John William \*Henry Dalrymple, within six calendar months after the decease of his kinsman, John Dalrymple, Earl of Stair. The plea then stated that the bond was, on the 3rd November, 1813, delivered by the defendant to W. Saunders, the subscribing witness thereto, merely as an escrow, on the condition that the same should remain in the hands of the said W. Saunders, until the decease of the said J. Dalrymple, Earl of Stair, and that then and then only the bond should be delivered to the said W. Murray; that the said writing obligatory accordingly remained in the hands and possession of the said W. Saunders, from the time of the delivery thereof to him the said W. Saunders as aforesaid for a long time, and until he the said W. Saunders, before the decease of the John Dalrymple in the condition mentioned, to wit, on the 10th March, 1819, wrongfully parted with the possession thereof, and the same thereby wrongfully came into the hands and possession of the said W. Murray; and so the defendant saith that the said writing obligatory is not his deed in manner and form as the plaintiff hath alleged. Second

† *Watkins v. Nash* (1875) L. R. 20 Eq. 262.

plea, that it was delivered as an escrow, on condition that the same should be delivered up to the said W. Murray, in case two promissory notes for 1,000*l.*, then outstanding, should be delivered up to W. Saunders, to be cancelled; and that the said last-mentioned notes have not, nor hath either of them, been delivered up to the said W. Saunders for the purposes aforesaid, or otherwise. Upon these pleas issues were joined. At the trial before Abbott, Ch. J., at the Middlesex sittings after Trinity Term, 1822, W. Saunders, the subscribing witness, proved the execution of the bond, and also gave in evidence the following facts. He acted as the attorney of the defendant \*when the bond was executed. At that time Murray, the intestate, held two promissory notes of the defendant's and had threatened to put them in suit. The defendant, in consequence, proposed to give the intestate the bond in question, but desired that it should not go into the market before the death of Lord Stair, as that might have the effect of creating a prejudice in his mind to defendant's disadvantage. It was agreed by all the parties, before and at the time of the execution of the bond, that it should remain in Saunders's hands until the death of Lord Stair, and that it should not even then be delivered up to Murray until he gave up the notes, and the defendant would not have given the bond unless that had been assented to. The bond, however was attested, sealed, and delivered in the usual way, and no other than the words usual on the execution of a bond were used by the defendant when he executed the bond in question. In 1812 Saunders had been a surety for the wife of the intestate, upon her taking out letters of administration; and he desired an indemnity to protect himself, and he kept the bond in question partly for his own security. Some weeks after it had been executed, Murray, the intestate, told Saunders that his, Murray's, wife had misapplied some money belonging to the estate, and observed at the same time, that he, Saunders, was indemnified, for he held Lord Stair's bond. John Lord Stair died in June, 1821, and the defendant then succeeded to the title; Saunders, however, in the beginning of 1819, at Murray's request, had delivered the bond over to him for the purpose of depositing it with his woollen-draper, as a security. Upon cross-examination

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he stated that the bond was executed upon the express condition that it \*was to remain in his hands until the death of Lord Stair, and until the notes were delivered up. Upon this evidence it was contended, that the plaintiff ought to be nonsuited, inasmuch as it appeared to be the intention of the parties that the instrument should not operate as a deed until the death of Lord Stair; and *Johnson v. Baker*† was cited. The LORD CHIEF JUSTICE reserved the point, and the plaintiff had a verdict, with liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained in last Michaelmas Term,

The *Solicitor-General*, Gurney, and Comyn, in Easter Term shewed cause:

[ \*86 ]

The defendant delivered the instrument as his deed, and it took effect as a deed from the moment of such delivery. In order to make it operate as an escrow, the defendant ought, at the time of the execution, to have said that it was to become his deed only upon the death of Lord Stair, and upon the delivering up of the two notes; but having delivered it as his deed, with a request to Saunders to keep it till the notes were delivered up, it operates as such from the moment of its delivery. This distinction is pointed out in Sheppard's Touchstone, 58. The learned author, after defining an escrow, states "that it is essential that the form of words used in the delivery of such an instrument should be apt and proper, as, for example, I deliver this to you as an escrow to deliver to the party as my deed, upon condition that he do deliver to you 20*l.* for me, or upon condition that he deliver up the old bond he hath of mine for the same money, (or as the case is,) or I deliver this to you as an escrow, to keep until such a day, upon condition that \*if before that day, he to whom the escrow is made shall pay to me 10*l.* or give me a horse, or enfeoff me of the manor of Dale, or perform any other condition, that then you shall deliver the escrow to him as my deed. But if when the deed is delivered to the stranger, I use these words 'I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions; or to deliver to him to whom it is made when he comes to London,' in this case

† 23 R. R. 338 (4 B. & Ald. 440).

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the deed takes effect presently, and the party is not bound to perform any of the conditions." This is an authority to shew that the intention that an instrument should operate as an escrow, should be clearly expressed at the time of execution.† But assuming that not to be necessary, it sufficiently appears from the whole of the evidence to have been intended that this should operate as an effective deed from the moment of its execution. It was given to prevent two other effective securities from being put in force against the defendant. It was left in the hands of Saunders, his own attorney, in whom he had a special confidence; and Murray the deceased understood it to be a valid security, for he told Saunders that he was secure against any claims that might be made upon him, as he held Lord Stair's bond.

*Scarlett* (and *Marryat* and *Lawes* were with him) *contra* :

The question is, whether the defendant intended this instrument to operate as a deed from the moment of its execution, or only upon Lord Stair's death and the delivery up of the notes. Now it appears from the evidence of Saunders, who was called as a witness on the part of the plaintiff, to prove the execution \*of the bond, that it was agreed both before and at the time of the execution, that it should remain in the hands of him, the defendant's attorney, until the death of Lord Stair, and until the notes were delivered up; and that unless that had been assented to by Murray, the defendant would not have given the bond; and in his cross-examination, Saunders stated that it was delivered upon that express condition. He was then stopped by the COURT.

[ \*87 ]

ABBOTT, Ch. J. :

Upon further consideration, we are all of opinion that there ought to be a new trial in this case, and that it should be presented as a question of fact for the jury upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of such delivery, or whether it was delivered to Saunders upon the express condition that it was not to operate

† See further as to the delivery of an instrument, as an escrow or deed, Vin. Abr. Fait. (M); Co. Lit. 36.

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as a deed until the death of the then Lord Stair, and then only upon the delivering up of the two promissory notes. The jury must draw their conclusion from the whole of the evidence given by Saunders; and it will be competent to either party who shall be dissatisfied with my direction to tender a bill of exceptions, and the question may be raised upon the record, whether an instrument can in any case operate as an escrow, unless the party at the time of its execution uses express words to shew his intention that it should not operate as a deed until a given event happen.

*Rule absolute for a new trial.*

[ \*88 ]

The cause was tried again at the sittings after Easter Term; and Saunders having given nearly the same evidence, the LORD CHIEF JUSTICE told the jury that \*if the instrument was delivered as the deed of the defendant binding on him at the time, although it was delivered on the faith and confidence which he reposed in Saunders, his attorney, that he would not part with it until the death of Lord Stair, and until the notes were delivered up, that it immediately became the defendant's deed, and although Saunders in fact parted with it before Lord Stair's death, and before the delivering up of the two notes, in violation of the trust reposed in him, it was still the defendant's deed in a court of law, whatever relief he might obtain in a court of equity; that it was like the common case where a conveyance is executed before the consideration money is paid, and the deed is left in the hands of the attorney until it is paid, although the attorney parts with it before payment, there is no relief at law. But if the delivery itself at the time was conditional, so as not to constitute any present obligation, it was an escrow or writing merely, and not a deed; and the condition of the delivery having been broken, it had never become the deed of the defendant. To make the delivery conditional, it was not necessary that any express words should be used at the time. The conclusion was to be drawn from all the circumstances. It obviated all question as to the intention of the party, if at the time of delivery he expressly declared that he delivered it as an escrow; but that was not essential to make it an escrow. After

these observations his Lordship told the jury to find a verdict for the plaintiff, if, upon the whole evidence, they thought it was delivered as the deed of the defendant, binding at the time; and for the defendant, if, on the contrary, they were of opinion that the delivery itself was conditional, so as not to constitute a present obligation. The jury having found a verdict for the \*plaintiff, a rule *nisi* was obtained in this term for arresting the judgment, [on technical grounds which are not important] and the

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[ \*89 ]

*Rule was discharged.*

### HARDING v. WILSON.†

(2 Barn. & Cress. 96—100; S. C. 3 Dowl. & Ry. 287; 1 L. J. K. B. 238.)

1823.  
June 14.

[ 96 ]

Where a lease of premises described them as abutting on "an intended way of thirty feet wide," which was not then set out, and the soil of which was the property of the lessor; and an underlease was granted, describing the premises as abutting on "an intended way," not mentioning the width: Held, that the under lessee was entitled to a *convenient* way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained.

The underlease was of premises "together with all ways thereunto appertaining." A right of way over the original lessor's soil would not pass by those words.‡ Per HOLROYD, J.

CASE. The declaration stated that the plaintiff was possessed of a dwelling-house, and, by reason thereof, was entitled to a way from a common highway to his house, for horses, cattle, carts, and carriages; and that defendant obstructed the way by building a wall upon it. Plea, not guilty. At the trial before Abbott, Ch. J., at the Westminster Sittings after last Michaelmas Term, the following evidence was given. In August, 1809, a lease of a piece of ground was granted by one Sloane to W. Bolton; the abuttal on one side was described as "an intended way of 30 feet wide." The ground over which the way was to be made also belonged to the lessor. In 1811, Bolton underlet to

† Cited and distinguished by Lord SELBORNE, L. C., in *Furness Ry. Co. v. Cumberland Co-operative Building Society* (1884) 52 L. T. 144, 146.

‡ Cited on this point by FRY, J., in *Bolton v. Bolton* (1879) 11 Ch. D. 968, 971; 48 L. J. Ch. 467, 469.—B. C.



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plaintiff's landlord (one Pittard) a part of the ground so demised, "together with all ways thereunto appertaining;" and it was described as abutting "on an intended way," without mentioning any width. Pittard built a house upon it of which the plaintiff was tenant. In 1820, the defendant purchased the ground on the opposite side of the "intended way" mentioned in the first lease, and also the soil of that way, and built a wall, leaving a road only twenty-seven feet wide in front of the plaintiff's house. When the two leases above mentioned were made, the road had not been set out, but there had been a road 30 feet wide for about four years before the alleged injury was committed. It did not appear that the plaintiff had sustained any actual injury from the erection of the wall, the road being wide enough for carriages to pass and turn round. The LORD CHIEF \*JUSTICE observed, that the plaintiff had not a grant of a way of any particular width, and left it to the jury to say, whether under those circumstances, the wall was a nuisance. The jury found a verdict for the plaintiff, with nominal damages; and in Hilary Term a rule *nisi* for a new trial was obtained, against which

[ \*97 ]

*Gurney and Andrews* now shewed cause :

The plaintiff's landlord was entitled to a way thirty feet wide. The first lease described the intended way as thirty feet wide; and the second lease speaking of "the intended way," must have meant one of that width. No doubt the first lessee was entitled to a way thirty feet wide, and his under-tenant had the same rights. At all events, the question whether the wall were or were not a nuisance was properly left to the jury; and although according to the evidence it was possible for a carriage to turn round upon the road, still they were warranted in finding that it was not so commodious as before the wall was built. That was properly a question for them, and there is no reason to disturb their verdict.

*Scarlett and Littledale*, *contra* :

The lease to Pittard did not contain any grant of a way of a particular width. The property is described as bounded by an intended way, not saying how wide that was to be. There was

no privity between the under-tenant and the original lessor so as to entitle him to all the privileges granted by the first lease; and even if there were the description in that it does not amount to a grant of a way thirty feet wide. At the utmost, it would only amount to a covenant by Sloane to Bolton to make a way of that width; and until the way was set out, the party could \*only have a right to a convenient way. Although the way may at one time have been thirty feet wide, still the plaintiff must fail unless he can shew a grant; for his possession has not been long enough to warrant the presumption of one. It must be admitted that he is entitled to a convenient way, and accordingly his declaration claims generally a right of way for horses and carriages; and the evidence fully established that he has a convenient way for them, notwithstanding the erection of the wall. If Bolton was entitled to a way of thirty feet wide, no doubt he might abridge that right in an under-lease; and here he did so, by using the words "intended way," without specifying any width. If the plaintiff had in this instance the right which he claims, all under-tenants must be entitled to every privilege contained in the original lease.

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[ \*98 ]

ABBOTT, Ch. J. :

It appeared by the evidence at the trial, that the road now left in front of the plaintiff's house was as wide as convenience required, and that the plaintiff himself had declared that he sustained no inconvenience from the erection of the wall. His landlord, however, has a right to sue in his name; but as no injury has been sustained, cannot recover unless he establishes his right to a road of a particular width. Adverting to the lease from Sloane to Bolton, the former does not grant a way thirty feet wide, but only describes the land demised as bounded by an intended way of that width. That is merely an expression and declaration of an intention. If, indeed, that operated as a grant, the plaintiff's right might possibly have been made out; but if it was not a grant, a departure from the intention expressed will not give a right of action, unless some actual damage has been sustained. Here \*the evidence negatived any such damage. I am therefore of opinion that there ought to be a new trial.

[ \*99 ]

HARDING      BAYLEY, J. :

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I am of opinion that this question depends upon the construction of the original lease. Bolton had a right to some way, and he might have bargained for a road of a particular description. Without any expressed stipulation the law would give him a way of necessity, for the convenience of the houses which were to be built. In this case there was not any express stipulation as to the width of the way, but the abuttal was described as an intended way thirty feet wide. That was merely the intention of the owner of the soil. He does not expressly engage that the road shall be of that width. It was his intention to make it so at the time; but he uses no words which could fetter his intention, and prevent a deviation from it, provided a convenient way was left for Bolton and his under-lessees.

HOLBOYD, J. :

The plaintiff's claim, as stated in his declaration, is of a right to pass and repass on foot and on horse-back, and with cattle, carts, and carriages. He does not specify the particular width of the way; but the declaration would be sufficient, provided he proved a title to a way thirty feet wide. The ground on which the plaintiff's messuage is built, and the road also, originally belonged to Sloane. When he demised it, the party renting would have no right of way but such as was incident to the lease, or such as was expressly given. Upon the evidence, it appears that he still has a convenient way. But the plaintiff says that by the lease, a way thirty feet wide is given either

[ \*100 ]

expressly or by implication. It certainly is not given \*expressly. The intended way is no part of that which was granted; and the declaration of an intention is not an implied grant. Again, the under-lease describes the ground demised, and the ways granted by the words "all ways thereunto appertaining." The road in question being over the soil of the original lessor, would not pass by those words. Leases generally contain the words "heretofore used," by which such a way would pass. But in the absence of them, or any other words to the like effect, the under-lease would confer nothing more than a

convenient way. The rule for a new trial must therefore be made absolute.

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BEST, J. concurred.

*Rule absolute.*

### BISHOP v. HOWARD.†

(2 Barn. & Cress. 100—103; S. C. 3 Dowl. & Ry. 293; 1 L. J. K. B. 243.)

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June 17.

[ 100 ]

Where A., who held premises under a lease which expired at Midsummer, refused to give up the possession at that time, and insisted upon notice to quit, and afterwards continued in possession till Christmas, and paid rent at Michaelmas and Christmas: Held, that this was conclusive evidence of a tenancy, and that the landlord was entitled to recover a quarter's rent due at Lady-day.

ASSUMPSIT for use and occupation. Plea, general issue. At the trial before Abbott, Ch. J., at the London sittings, after last Michaelmas Term, it appeared that the defendant had, under a lease which expired at Midsummer, 1821, been in possession of a house belonging to the plaintiff. A short time before Midsummer the plaintiff applied to the defendant to give up the possession, who refused to do so without notice, and continued in possession until Christmas, when he tendered the keys to the plaintiff, who refused to accept them. No positive evidence was given of the payment of any \*rent at Michaelmas; but it was proved that the defendant paid a quarter's rent in March, 1822, and took a receipt for it, as for a quarter's rent due to the plaintiff at Christmas. This action was brought to recover a quarter's rent alleged to be due at Lady-day, 1822. The LORD CHIEF JUSTICE left it to the jury to say, whether a new agreement for a tenancy could reasonably be inferred from that which had passed before Midsummer, 1821, and from the payments above mentioned, or whether it was merely a holding over by the defendant. The jury found a verdict for the defendant; and in Hilary Term a rule having been obtained for a new trial,

[ \*101 ]

*Scarlett* and *R. Scarlett* now shewed cause :

After the expiration of the old lease the defendant was merely

† Referred to in judgment of *Doe* 957, 959; 14 L. J. Q. B. 327, 329.—  
*d. Clarke v. Smarridge* (1845) 7 Q. B. R. C.

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a tenant at will, and there could be no yearly or quarterly tenancy unless there were a fresh contract. But that was negatived by the jury. *Right dem. Flower v. Darby*† proceeded on the ground of such supposed contract. Here, no such contract existed before Midsummer, 1821, and therefore no continuation of it could be presumed. No notice to quit was necessary at Midsummer, for the term ended on a precise day: *Messenger v. Armstrong*.‡ And the defendant had a right to quit at Christmas when he tendered the keys of the house, the jury having found that no fresh contract was made. It appears as if there had been a mistake between the parties, and that they supposed the old tenancy to end at Michaelmas. That explains the defendant's refusal to give up the possession at Midsummer, and does away with the idea that any new tenancy was contemplated \*by the parties. In *Zouch dem. Ward v. Willingale*,§ where the landlord had distrained after notice to quit, that was certainly held a waiver of the notice; but there the defendant had before been tenant from year to year. Here there was no such previous tenancy; and the jury negatived the existence of a new agreement.

[ \*102 ]

*F. Pollock, contra :*

The evidence established a tenancy from year to year, or at least from quarter to quarter, as a presumption of law, and it was not a fit question for the consideration of the jury. Before Midsummer the plaintiff asked if the defendant would give up the possession, and the defendant refused to do so, and claimed a notice to quit. He must then have considered himself a tenant, and what was formerly a tenancy at will is now held to be a tenancy from year to year: *Doe dem. Flower v. Darby*, *Doe v. Watts*,|| *Doe v. Weller*.¶ It is not necessary that rent should have been paid for a whole year; payment for one quarter at Christmas was sufficient. Had the landlord brought ejectment against the defendant without notice, the production of the receipt for rent would have been an answer to the action.

† 1 R. R. 169 (1 T. R. 159).

‡ 1 R. R. 148 (1 T. R. 53).

§ 2 R. R. 770 (1 H. Bl. 311).

|| 4 R. R. 387 (7 T. R. 83).

¶ 4 R. R. 496 (7 T. R. 478).

ABBOTT, Ch. J. :

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It occurred to me at the trial, that the refusal to quit at Midsummer, and the payment of rent at Michaelmas and Christmas, were facts on which a new contract of renting the premises might or might not be presumed; and I considered it as a question for the jury and not as a question of law. I therefore left \*it to them to say, whether a tenancy was created, or whether there was a mere holding over by the defendant; and they found for him. If those acts were conclusive evidence of a new tenancy from year to year, my direction was wrong, and there ought to be a new trial. My learned brothers think that the commencement of another year and the payment of rent concluded the question in favour of the plaintiff. I have still some slight doubts upon the question, but defer to their authority.

[ \*103 ]

BAYLEY, J. :

It appears that, before Midsummer, in a conversation between the plaintiff and defendant, the latter insisted upon his right to have a notice to quit; that was holding himself out as tenant of the premises. He continued in possession until Christmas, and in March following, paid rent for the quarter ending at Christmas; that was evidence that a quarter's rent had been paid at Michaelmas. If he paid that money as rent, it took away his power to say that he was not tenant, as the receipt of it took away that power from the landlord. In the case put of an ejectment brought to recover possession, the production of the receipt or proof of the payment of rent at Michaelmas would have been a bar to the action; and the situation of the plaintiff would be singularly hard if he could not maintain either use and occupation, or ejectment. I think, therefore, that there should be a new trial.

HOLROYD and BEST, JJ. concurred.

*Rule absolute.*

1823.

[ 166 ]

# THE KING v. THE INHABITANTS OF MACHYNLLETH AND PENNEGOES.

(2 Barn. &amp; Cress. 166—169; S. C. 3 Dowl. &amp; Ry. 388.)

An indictment stated that an ancient bridge, situate within the parishes of Machynlleth and Pennegoes, was out of repair, and that the inhabitants of the said parish of Pennegoes and town of Machynlleth aforesaid, from time immemorial, by reason of the tenure of certain lands in the said parish of Pennegoes and town of Machynlleth, have repaired the bridges: Held, upon error, that the indictment was bad, because it did not appear that the bridge was situate within the town, and therefore that the inhabitants of the town were not liable, unless a special consideration were shewn; and that here no sufficient consideration was shewn, inasmuch as the inhabitants could not hold land, and therefore could not be liable by reason of tenure.

THIS was a writ of error upon a judgment of the Court of Quarter Sessions, for the county of Montgomery, upon an indictment for not repairing a bridge; which charged, that a certain ancient bridge over the river Diflas, commonly called Pont-felingerrig bridge, and situate within the parishes of Machynlleth and Pennegoes, in the said county of Montgomery, on the King's highway there, the same being from the time whereof the memory of man is not to the contrary, a common King's highway used for all the King's subjects, with their horses, coaches, carts, and carriages, to go, return, and pass at their will and pleasure, on, &c., and for the space of two years thence next following, was very ruinous, &c., for want of due reparation thereof, so that the subjects of the King, with their horses, &c., could not pass as they ought, and were wont to do. The indictment then stated, that the inhabitants of the said parish of Pennegoes, and the inhabitants of the said town of Machynlleth aforesaid, in the said county of Montgomery, from the time whereof, &c., and by reason of the tenure of their lands and tenements in the said parish of Pennegoes and town of Machynlleth, have repaired, &c., the said bridge, &c. It was then alleged upon the record, that A. B. of the said parish of Pennegoes, and C. D. of the said town of Machynlleth, two of the inhabitants of the said parish of Pennegoes and the town of Machynlleth came into Court, and pleaded not guilty. The trial of \*the indictment was then stated, and that defendants were found guilty; and that it

[ \*167 ]

was adjudged that the said inhabitants in the indictment specified should pay a fine of 400*l*. The following errors were assigned : first, that the inhabitants of the parish of Pennegoes, and the inhabitants of the town of Machynlleth, were stated to be jointly liable to the repair of the bridge ; and, secondly, that it was not stated in the indictment that any part of the bridge was within the town, or that the inhabitants of the parish of Pennegoes, and the inhabitants of the town of Machynlleth, were a body corporate. The case was now argued by

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*Sir William Owen :*

The offence charged is the non-repair of the whole bridge, which arises not from the joint neglect of the two bodies, but from the separate neglect of each. The offence, therefore, should be charged *separaliter*, or in separate indictments: 2 Hale's P. C. 174 ; Hawkins, P. C. b. 2, c. 25, s. 89 ; *Rex v. Kingston*,† *Rex v. St. Pancras*.‡ Secondly, the bridge is charged to be in the parish of Pennegoes and Machynlleth ; but no part of it is stated to be in the town of Machynlleth, *non constat* that the town and the parish are co-extensive, or that the town is in the parish ; and it is clear that the inhabitants of a town would not be bound to repair a bridge situated out of the town : *Rex v. The Inhabitants of Gamlingay*.§ And *Rex v. St. Giles, Cambridge*,|| is an authority to shew, that in order to charge a parish for the repair of a road situate out of the parish a consideration must be shewn. The effect \*of this indictment is to charge the inhabitants of a town to repair a bridge situate out of the town. Thirdly, the inhabitants of the county being liable to repair, the inhabitants of a township cannot be liable to repair by reason of the tenure of lands, because, as inhabitants, they cannot hold lands : *Ireland and Free Borough case*,¶ *Viner's Abr. Corporation (E.)*. And they cannot be intended to be a corporation by the name of inhabitants : *College of Physicians v. Salmon*,†† and *Anonymous*.‡‡

[ \*168 ]

[He was then stopped by the COURT.]

† 9 R. R. 373 (8 East, 41).

‡ 1 Peake, 286.

§ 3 T. R. 513.

|| 17 R. R. 320 (5 M. & S. 260).

¶ 12 Co. Rep. 121.

†† 1 Ld. Raym. 680.

‡‡ 1 Salk. 191.



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MACHYNLLETH.*Campbell, contrà :*

It must be taken upon this record, that the bridge is within the town, or that the inhabitants of the parish and town are liable by tenure. The indictment charges a joint obligation of the parish and township to repair, and if so, a neglect to repair constitutes a joint offence.

(BAYLEY, J. : Can you shew that the inhabitants of a town can in any case be bound to repair a bridge situate out of the town.)

The indictment charges that the bridge is situate within the two parishes, and then that the inhabitants of the parish and the inhabitants of the town of Machynlleth aforesaid have been used to repair. Now there is no other Machynlleth mentioned before, but the parish, and the word "aforesaid" must therefore refer to the parish of Machynlleth, and the word "town" may be rejected as surplusage. But assuming that the bridge does not appear to be within the town, the indictment is still good ; for the offence is not charged to be by reason of the common law liability, but by reason of the tenure, and the inhabitants \*of the parish and of the township may be liable by reason of a joint tenure of the same lands.

[ \*169 ]

BAYLEY, J. :

The objection to this indictment is fatal. The bridge is described as situate within the parishes of Machynlleth and Pennegoes. But the parishes are not alleged to be within the town. And unless the bridge be situate within the town, the inhabitants of the town would not be liable unless a special consideration be shewn. And here they cannot in their character of inhabitants be liable by reason of the tenure of lands. For they cannot as such hold lands.

HOLROYD, J. :

It is quite clear that the judgment cannot be supported. The word "town" cannot be rejected, and if it could, it would not then appear upon the record that any person came to defend for the parish of Machynlleth.

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The case of *The King v. The Inhabitants of St. Giles, Cambridge*, is an authority to shew that the inhabitants of a township cannot be liable for the repair of a road situate out of the township, unless a consideration for such repair be shewn. Here that is attempted to be shewn, by alleging that the inhabitants of the parish and the town were liable by reason of the tenure of certain lands, but as inhabitants they could not hold lands, and it is not shewn that they are incorporated. The consideration, therefore, fails, and it not being shewn that the bridge was within the town, the common law liability does not attach, and therefore the judgment cannot be supported.

*Judgment reversed.*

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IN ERROR.

(2 Barn. & Cress. 170—178; 2 Bing. 199—204; S. C. 3 Dowl. & Ry. 433;  
1 L. J. K. B. 252.)

The declaration stated that the plaintiff and defendant, by articles of agreement (reciting that several actions arising out of the same transaction had been brought, and defended by the plaintiff and defendant, G. A. and D. A., and that in one of them the assignees of one G. T., a bankrupt, recovered against the plaintiff 2,500*l.*, and that disputes existed between the plaintiff and defendant respecting the value of the goods and stock which each had received from a certain farm, and their keep and feeding by the plaintiff, and also concerning the proportion which each was to pay of the said sum of 2,500*l.* according to an agreement entered into between them before the trial, and also concerning the costs of bringing and defending the actions above mentioned), submitted themselves to the award of J. T., J. R., and T. C. respecting the said matters; that the arbitrators, taking the said matters into consideration, awarded the defendant should pay the plaintiff 444*l.*; that five eighth parts of the costs of the several actions before mentioned should be paid by the plaintiff, and three eighths by the defendant; that the sums already expended by either of them should be allowed as part payment of his proportion; and that when the sum of 444*l.* and the costs, including those of the arbitration and award, were paid, mutual releases should be given. On demurrer, held that the plaintiff was entitled to recover the 444*l.*: for that as to the first part of the award, nothing appeared on the declaration to shew that the arbitrators had not awarded the sum of 444*l.* after taking into consideration the value of the stock and goods; that it was sufficiently certain; and that if the arbitrators had exceeded their authority as to costs, it was not sufficient to invalidate the award.

DEBT on an award. The declaration stated that certain differences having arisen, and being between the plaintiff and defendant, on, &c. at, &c. by articles of agreement made between the plaintiff of the one part, and the defendant of the other part; reciting, that an action was then lately depending in the Court of King's Bench, between Cargey as plaintiff, and one Thomas Purvis, defendant, which cause came on to be tried at the then last assizes for Northumberland, upon which a verdict was given for the defendant; and reciting also, that another action was depending in the said court, wherein the assignees of John Tarleton, a bankrupt, were plaintiffs, and the said plaintiff was defendant, and which last mentioned action came on to be tried at the same assizes; and reciting also, that there were several

actions depending between the said assignees and the said defendant in the present action, George Aitcheson, and David Aitcheson, relating to the same transaction; \*and reciting also, that it was agreed that a judgment in the action by the said assignees against the plaintiff, should be recorded for the plaintiffs with 4,000*l.* damages; and that a rule of Court was drawn up, that upon payment of 2,500*l.* to the plaintiffs, and immediate possession of a certain farm at Great Ryle, in the county of Northumberland, delivered by the said G. A. and D. A., the tenants thereof to their landlords, the said judgment should be satisfied; that all the actions pending for the same transactions should be no further proceeded in, and that each party should pay his own costs; and reciting also, that divers disputes and differences had arisen between the said plaintiff and the said defendant in this suit, about the value of the stock and goods which each of them received into their custody from the said farm, and their keep and feeding by the plaintiff in this action; and also concerning the sums, which, according to an agreement entered into between them before the said assizes, they respectively should contribute towards the payment of the 2,500*l.*, and the costs incurred in bringing and defending the said actions brought and defended by the now plaintiff and defendant, G. A. and D. A.; and that, in order that the said differences might be amicably settled, the plaintiff and defendant in this suit had agreed to refer the same to J. T., J. R., and T. C., as thereafter mentioned; it was witnessed that, for ending all disputes and differences between the said parties thereto, the plaintiff did thereby covenant with the defendant, and the defendant did thereby covenant with the plaintiff, that they, the plaintiff and defendant, would truly perform the award of the said J. T., J. R., and T. C., of and concerning the said matters in difference; the declaration then averred \*the making of an award by the arbitrators, which award, after reciting the articles of agreement, was as follows: We the said J. R., J. T., and T. C., having taken upon ourselves the burden of the arbitrations, and having heard and weighed the allegations of both the parties concerning the matters so in difference as aforesaid, and examined the various vouchers, documents, and evidence, relating thereto, do, by these

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presents, in writing under our respective hands, award that all disputes and differences now or heretofore subsisting between them, or between the said Gilbert Cargey and James Aitcheson, relative to the matters referred to us by the articles of agreement, shall henceforth cease and determine. And we further award that the said James Aitcheson do and shall pay unto the said Gilbert Cargey on, &c., the sum of 444*l*. And we do hereby further award that the said Gilbert Cargey shall pay or cause to be paid five-eighth parts and the said James Aitcheson shall pay three-eighth parts of all costs incurred either in prosecuting the action brought by the said G. Cargey against T. Purvis, or of defending the several actions wherein the assignees of J. Tarleton, a bankrupt, were plaintiffs, and the said Gilbert Cargey, James Aitcheson, G. A. and D. A., were defendants, or any or either of them. And we further award, that all such sums of money as the said Gilbert Cargey and James Aitcheson have already paid, laid out and expended, for and towards or on account of the said suits, or either or any of them, or any way connected therewith, shall be considered and deemed as part payment of their respective shares, according to the proportions above mentioned.

[ \*173 ] And we further award, that all expences \*attending this arbitration and of these presents, shall be paid and satisfied by the said Gilbert Cargey and James Aitcheson, in equal shares and proportions; and lastly, we further award, that the said Gilbert Cargey and James Aitcheson shall, upon payment of the sum of 444*l*., and the costs, charges, and expences of the said several suits, and the charges and expences of this arbitration, execute unto each other mutual and general releases and discharges of all actions, &c. relating to the premises so referred, or any of them, from the beginning of the world to the day of the date of the said hereinbefore in part recited articles of agreement. Breach, non-payment of the sum of 444*l*. Demurrer and joinder.

*F. Pollock*, in support of the demurrer :

The award is bad for two reasons : first, it is not in pursuance of the submission ; and secondly it is not final. The direction, that the defendant should pay a specific sum, is not in pursuance of the authority given to the arbitrators, which was, that they

should determine what was value of the stock and goods taken from the farm, and what each should contribute towards the sum of 2,500*l.* and costs. It was not competent for them to get rid of the calculation by awarding that one party should pay a certain sum, nor by giving proportions whereby a calculation should be made respecting the costs and expences. In *Matthews v. Price*, in C. B. (not yet reported) the submission was that an estimate of certain expences should be made, and a sum certain being awarded, that was held bad. Then the direction in the award, that the sums already expended should be taken, as part of the proportions to be paid is not final, but \*must be matter of future reference, so that there could be no end of the discussion. Besides if either party had already advanced more than his proportion, no remedy is provided for him.

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[ \*174 ]

*Wightman, contra :*

The plaintiff, Cargey, was originally liable to pay the entire sum of 2,500*l.* The award, therefore, by stating that the defendant shall pay 444*l.* does, in fact, fix the proportion which each shall pay, for Cargey must discharge the residue. This part of it, then, is certain, and according to the submission. The remainder of the submission was as to the cost and expences, and the arbitrators have awarded that they shall be borne in certain proportions. It was impossible for them to render that part of the award more certain, until the costs were taxed ; and as the taxation will make that part of the award certain, the rule *id certum est quod certum reddi potest* applies : *Beale v. Beale*,† *Hanson v. Liversedge*.‡ With respect to that part of the award which directs that the sums already expended shall be allowed in the calculation, that either relates to the costs, and is therefore sufficiently certain and final, or it is beyond the submission, and if so, it cannot vitiate that part of the award which is according to the submission. After payment of the sum of 444*l.*, and the proportion of the costs, the plaintiff could have no further demand against the defendant, for then the award directs, that mutual releases shall be executed : *Bargrave v. Atkins*.§

† 1 Roll. Abr. 251, pl. 14.

§ 3 Lev. 413.

‡ 2 Ventr. 242.

CARGEY      The plaintiff is therefore clearly entitled to recover the sum of  
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 AITCHESON. 444l., which is the whole of the demand in the present action.

[ 175 ]                    *Pollock*, in reply :

The cases cited are distinguishable from this, for where the submission does not point out the matters in dispute, they must be shewn by evidence ; but here certain matters were pointed out by the submission, and if the arbitrators have not decided on the whole of them the award is bad. Personal expences were within the submission ; if it be uncertain whether the arbitrators took them into consideration, the award is bad on that ground ; if it be admitted that they were taken into consideration, the award is bad, not being final in that part of it.

BAYLEY, J. :

I am of opinion that the plaintiff is entitled to recover. The action is on an award set out in the declaration, and the plaintiff will be entitled to recover on that part of the award, whereupon a breach is assigned, unless the Court can see that it is bad. It is alleged to be contrary to the submission, and not final ; but it is necessary for the defendant to make out the objection, and to make it out by something appearing on the face of the declaration, Whether any fresh facts might have been stated, which would have helped to support the objection, is not a question before the Court, for we can only look to the pleadings. Now the matters submitted are, the value of the stock and goods which each of the parties received into his custody, and their keep and feeding by the plaintiff, the sum or sums which, according to an agreement entered into between them, they should respectively contribute towards the payment of the said sum of 2,500l., and the costs incurred in bringing and defending certain actions. The plaintiff would be bound to pay the whole sum of 2,500l., the judgment being against him, and must now discharge \*all but the part awarded to him. The award imports, that the arbitrators have taken into consideration the matters in difference, and they first award, that all disputes shall cease, then that the defendant shall pay a certain sum. That imports, that the arbitrators taking into consideration the value of the goods, the stock, and their

keep, and feeding, thought that the defendant ought to pay 444*l.* We cannot presume that they omitted any thing, and must therefore conclude that 444*l.* was the proportion which the defendant was to pay of the 2,500*l.* taking all the other ingredients into the account. Then, is the other part of the award final? The submission is of the costs and expenses, incurred in bringing and defending certain actions. Now the sum to be paid might be ascertained either by fixing it in the award, or referring it to an officer whose duty it is to say what shall be the whole sum paid for costs. Perhaps justice could only be done by fixing the proportion which each should contribute; for the award was to be made within a limited time, and the costs might not then be taxed. It has been observed that the agreement referred to should have been shewn; but the defendant might have pleaded that, if there were any thing in it which would vitiate the award. In the absence of any such plea, we cannot presume any thing against the award. Another objection made was, that the award directs that the sums already expended shall be allowed as part of the proportions to be borne by each. That would make the award final or otherwise, according as there were or were not disputes about the amount expended. If it were a matter of controversy, the defendant might have pleaded it. In the absence of any such allegation, \*it does not appear that there was any controversy upon that point. The objection therefore fails; and the award being good as to the 444*l.* the plaintiff is entitled to judgment in his favour.

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[ \*177 ]

HOLROYD, J. :

The award cannot, upon these pleadings, be considered not final. That must either appear upon the face of the award or by facts stated in a plea. It does not appear upon the face of the award. The decision of the arbitrators may have embraced all the matters in dispute mentioned in the submission. The sum of 444*l.* may have been awarded to the plaintiff upon the disputes as to the value of the goods and stock, their keep, and the 2,500*l.*; and it appearing by the submission that the plaintiff was the person from whom that sum was recovered, he must of course pay the residue, the award is therefore final as to that,



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and according to the submission. If there were other facts not taken into consideration, that should have been shewn by a plea. The other objection resolves itself into the same question, whether the award be final or not. The dispute might be as to the proportion of the costs which should be borne by each party. The arbitrators have decided that; but by law the costs are to be taxed by an officer of the Court, and, therefore, although the arbitrators have not determined the amount, that is not a valid objection to the award. Had they awarded that the whole of the costs should be paid by one party, that would have been good without ascertaining the amount; and the award is consequently good, awarding that they shall be borne by the two parties in certain proportions. If it had been alleged in a plea that the sums already expended were a matter in controversy, that might have \* vitiated the award. But upon a demurrer to the declaration, we must say that the objections are not established; if that could have been done by extrinsic evidence, it should have been pleaded.

[ \*178 ]

BEST, J. :

An award should always be supported, unless there be some unanswerable objection to it. It is said that this award is uncertain, and not final; uncertain as to the 444*l.*, but that is not so. The question submitted was, what proportion of the 2,500*l.* should be borne by the defendant. After payment of the 444*l.*, and the execution of the releases awarded, all discussion as to that must end; the award is therefore certain. But then it is urged, that if the award be not final in another part, it is altogether void; and it is argued that the award is not final as to the costs and the mode of paying them. As to the costs, the award directing that each shall bear a certain proportion is final. As to the mode of paying them, viz., by allowing the monies already expended as part, I think that was not within the submission, and therefore cannot vitiate the award. The submission was, of the costs to be paid, not of the mode of paying them. The general rule, that the arbitrators shall fix the sum to be paid, is not applicable to costs; for the arbitrator is not competent to ascertain them, and there is an officer of the Court appointed for that purpose. It is therefore sufficient if the

proportions are fixed. For these reasons the plaintiff is entitled to judgment.

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*Judgment for the plaintiff.*

## AITCHESON v. CARGEY

IN ERROR.

1824.  
June 25.

[ 2 Bing.  
199 ]

(2 Bing. 199—204; S. C. 9 Moore, 381; 13 Price, 639; M'Clel. 367.)

[The defendant brought error on the above judgment to the Exchequer Chamber.]

\* \* \* \* \*

*Campbell*, for the plaintiff in error :

[ 202 ]

The award is bad, because it is uncertain, and exceeds the submission. There is a distinction in the cases between a general reference and a reference of specific points. On a general reference a party who is dissatisfied, on the ground that any of the matters referred have been omitted in the award, must himself make out that there has been such an omission; but on a reference of specific points, such as the present, the award is bad if it does not contain on the face of it a determination on each of the specific points; for the consideration of submitting to such a reference is, that all the points shall be settled: *Randall v. Randall*.† If the general words, “The arbitrators have heard and weighed the allegations of the parties touching the matters in difference,” would cure such an omission, no award would ever be bad. In the present award the arbitrators have omitted to specify, first, the value of the stock and goods which each of the parties had received into their custody from the farm; secondly, of their keep and feeding by the plaintiff; \*thirdly, the sums which the parties

[ \*203 ]

were respectively to contribute towards the 2,500*l.* Then with respect to costs, the submission is only as to “the costs incurred in bringing and defending the said actions brought and defended by the plaintiff and defendant below, G. A. and D. A.,” whereas the award is not only as to “all costs incurred either in prosecuting the action brought by the said G. Cargey against

† 8 R. R. 601 (7 East, 81; 3 Smith, 90).

AITCHESON T. Purvis, or of defending the several actions wherein the  
 v. assignees of J. Tarleton a bankrupt were plaintiffs, and the  
 CARGEY. said G. Cargey, J. Aitcheson, G. A., and D. A. were defend-  
 ants," but also as to "all expences attending the arbitration  
 and award." This clearly exceeds the submission: it cannot be  
 separated from the rest of the award, and renders the whole vitious.

*Wightman*, for the defendant in error, was stopped by the  
 Court.

BEST, Ch. J.:

This is a writ of error from the Court of King's Bench in an  
 action on an award. The award has been set out in the declara-  
 tion, to which there is a general demurrer, and there is no plea  
 that points are contained in the submission which the arbitrators  
 have not decided. We can only look, therefore, to what appears  
 on the face of the award, and in order to give validity to the  
 objections that have been raised, it must, according to what was  
 laid down by Lord ELLENBOROUGH in *Randall v. Randall*, appear  
 upon the award that points which have been submitted to the  
 arbitrators remain undecided. But nothing of this sort appears  
 in the declaration. It has been objected that the value of the  
 stock and goods which each of the parties received into their  
 custody from the farm has not been ascertained; nor the  
 expence of their keep and feeding; nor the sums which the  
 parties should respectively contribute \*towards the payment of  
 the 2,500*l.* But no case has been decided in which arbitrators  
 have been required to shew the steps by which they arrive at  
 their conclusions. It is enough if it appears they have taken  
 into consideration all the matters submitted to their judgment:  
 they say they have done so here; they award that the defendant  
 shall contribute 444*l.*, and that the parties shall execute general  
 releases, and this does finally settle all the points in dispute.  
 The objection raised in the Court below, that only the proportion  
 of costs which each should pay was specified, instead of the sum  
 actually payable, has not been repeated to-day; but it has been  
 urged that the arbitrators have exceeded their authority in dis-  
 posing of costs over which they had no control. If that be so, it  
 is an excess which does not vitiate the whole award: it is simply

[ \*204 ]

a decision on a matter not regularly before the arbitrators, and to that extent may be considered a nullity; but the rest of the award remains unimpeached, and the judgment below must be

*Affirmed.*

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THE KING v. THE INHABITANTS OF THE EXTRA-  
PAROCHIAL HAMLET OF KINGSMOOR.

1823.

[ 190 ]

(2 Barn. & Cress. 190—196; S. C. 3 Dowl. & Ry. 398.)

An indictment stated that a certain way was an ancient common highway, and that a certain part situate in an extra-parochial hamlet was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair it: Held, that this indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorially bound to repair; nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair.

Quære, Whether the inhabitants of the hamlet would be liable to repair at common law, if the indictment had contained the latter allegation?

THIS was an indictment preferred against the defendants at the Quarter Sessions for the county of Cumberland, for not repairing a road. The indictment charged the way in question to be an ancient King's highway, used for all the King's subjects; and that a certain part, situate in the extra-parochial hamlet of Kingsmoor, in the said county, therein described, was out of repair; and that the inhabitants of the extra-parochial hamlet of Kingsmoor, the said common highway ought to repair and amend. The defendants were found guilty at the Quarter Sessions, and a writ of error was afterwards brought upon the judgment; and the error assigned was, that it did not appear by the indictment in what right, or for what cause, the inhabitants of the extra-parochial hamlet of Kingsmoor were bound to repair. The Court now called upon

*Agliouby*, in support of the judgment:

It is for the public benefit that the roads of the kingdom should be kept in good repair, and the law has thrown that burden upon the inhabitants of certain known districts; the parish is, generally speaking, that district. Here the road is situate in an extra-parochial district, and upon principle the

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 [\*191]

inhabitants of that district ought to be charged with the burden of repairing it. It is clear that the inhabitants of a parish are liable, not by particular custom, but of common right: *Rex v. Sheffield*,† \*and *Rex v. Penderryn*.‡ But the common law obligation must have existed before the ecclesiastical division of the kingdom into parishes took place. The civil divisions of the kingdom into counties, hundreds, and tithings, is more ancient, having taken place A. D. 890, and, according to some authorities, at a much earlier period;§ whereas the ecclesiastical division was not completely effected till long after that time: 1 Bl. Comm. 112. Before the ecclesiastical division took place, the inhabitants of some known district must have been liable to the repair of the roads; and if any such district were not then included in the division of the kingdom into parishes, the liability to repair the roads, situate within it, remains as it was before. Now the road indicted is situate in a hamlet, or vill, not forming part of any parish, and therefore the inhabitants of such hamlet must be liable to repair of common right. The inhabitants of a vill were formerly liable at common law to the repair of roads: 27 Liber Assisarum, 44 (21). In Compton's Jurisdiction, 76 Lib. Ass. 63 is erroneously cited for this position. In 15 Car. II. the inhabitants of the hundred of Yarton were indicted for not repairing a road: *Rex v. Yarton*;|| and there TWISDEN, J. stated that he had been counsel on a similar indictment for the vill of Camberwell. A parish is a mere precinct, within a diocese, and may comprehend several vills, or be part of a vill: Com. Dig. tit. Parish (B 1). A parish was not even recognized by common law; and when a place was mentioned generally, it was intended only to be a vill: *Wilson v. Laws*,¶ *Addison v. Sir John Otway*.††

[\*192]

(BAYLEY, J.: Assuming a vill to be liable, still the hamlet indicted may, for any thing that appears upon this record, be one of two or more hamlets forming one entire vill; and although the larger district should be liable, yet the hamlet, if a division only

† 1 R. R. 442 (2 T. R. 106).

‡ 2 T. R. 513.

§ Note to Thomas's Edit. of Co.

Litt. 49; Burn's Ecc. Law, 1, 65.

|| 1 Sid. 140.

¶ 2 Salk. 501.

†† 1 Mod. 250; Freeman's Rep. 228; Co. Litt. 125 b.

of the vill, would resemble a township, a division of a parish, and the manner in which the liability was incurred, must be shewn in an indictment against a township.)

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A township is a known portion or division of a larger district, which is recognized as liable by the common law to repair the highways within its limits ; and therefore it is necessary that an indictment against the smaller division should shew in what way it has taken upon itself a burden to the relief of the larger district which was originally liable, and of which it forms a part. Besides a hamlet and vill are synonymous : *Rex v. Morris*,† *Rex v. Walbech*.‡ A hamlet is, therefore, a division of the kingdom recognized by the law. A special custom may be alleged within it;§ and it is mentioned as a known district in the statute 27 Hen. VIII. c. 25. The inhabitants of such division, if extra-parochial, must be liable to repair as of common right, both upon principle and authority : and if so, it cannot be necessary to allege immemorial usage to repair. The older authorities shew that a vill is liable at common law, and therefore that it is not necessary to allege an immemorial liability. Nor can it be necessary to aver, that a hamlet is not part of a larger district, the inhabitants of which are bound to repair. For that is not to be intended, inasmuch as, generally speaking, the parish only is liable ; and it appears upon the face \*of the indictment that the road is situate in a hamlet which is not included in any parish. Therefore, *prima facie*, no persons are liable but those who were made defendants in this indictment.

[ \*193 ]

*Courtenay, contra*, was stopped by the Court.

BAYLEY, J. :

It is the duty of a party preferring an indictment to shew, on the face of it, an obligation in the party indicted to discharge the duty for the neglect of which the indictment is preferred. It must be shewn that the party indicted is either liable of common right, or from some other special cause. The inhabitants

† 4 T. R. 550.

§ Co. Litt. 110 b.

‡ 1 Bott. 38.

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of a parish are liable as of common right, and therefore, as against them, it is sufficient to allege that they ought to repair. But if it be sought to charge the inhabitants of part of a parish with the burden of repair, that being against common right, it must be shewn on the face of the indictment how they are liable, whether by custom or prescription: *Rex v. Penderryn*. It is said, however, that the inhabitants of an extra-parochial hamlet are, in this respect, in the same situation as the inhabitants of a parish, and are liable as of common right. I think we are not warranted, upon this indictment, in coming to that conclusion, nor are we called upon to decide whether the inhabitants of every known district were or were not bound by common law to repair the roads within it. In order to raise that question, it ought to have been shewn on the face of the indictment, that the hamlet of Kingsmoor neither forms part of, nor is connected with, any other larger district, the inhabitants of which are liable to repair the road in question. That not being \*stated, the general question is not raised. I am therefore of opinion that this indictment is bad, inasmuch as it does not shew that the hamlet of Kingsmoor is not part of any larger district, upon the inhabitants of which the obligation to repair may attach, or that the defendants are liable by immemorial custom or prescription. The judgment must therefore be reversed.

[ \*194 ]

HOLROYD, J. :

I think this indictment is bad. Upon a plea of not guilty to an indictment not charging a special obligation to repair, the general obligation need not be proved. The plea puts in issue only the facts alleged, and not the legal liability. In a common indictment against a parish for not repairing a road, upon a plea of not guilty, it is not necessary for the prosecutors to prove that the parish is liable, because the common law throws that burden upon the parish. In order to put in issue the liability of the parish, the defendants by their plea must shew a special obligation in some other body to repair. Here the only allegation of fact is, that an ancient highway, situate within the hamlet, was out of repair. The obligation to repair is stated as a conclusion

of law, resulting from the fact of the highway being within the hamlet; and it would not be necessary at the trial, upon the plea of not guilty, to prove any special obligation to repair. Now if this indictment be good, it would not have been a good defence to shew that the hamlet was part of a larger district, the inhabitants of which were bound to repair the road in question. Assuming, therefore, that an extra-parochial place may be in this respect subject to the same liability as a parish; more should have been alleged on the face of the indictment to make the common law liability attach. All \*the facts alleged in this indictment may be true, and yet the hamlet indicted may be part of a larger district, in which there is a present obligation to repair.

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BEST, J. :

It is not necessary to consider whether the civil division of the kingdom is more ancient than the ecclesiastical, inasmuch as it is clear that the latter took place before the time of legal memory, and it is indisputable that the common law has thrown the burthen of repairing roads on parishes. If you proceed against any other district you must not only allege, that the inhabitants of such district are bound to repair, but you must shew from what the obligation to repair arises, viz. that they were bound by custom or prescription.† The cases in which this has been decided have been, where it has been attempted to throw the whole burthen of repairing roads on particular divisions of a parish, such as townships, instead of the entire parish. Those cases may be said not to apply to that which is now under consideration, because here there is no parish on which the charge can be thrown, the hamlet in which the road is situated being stated to be extra-parochial; but they are authorities which answer the argument, that the common law imposes the burthen of repairing on districts included within the common law division, and not such as belong to the ecclesiastical division. I can find no authority for saying that any thing but a parish is to be charged. If the law authorizes no charge except on parishes, places that are extra-parochial are

† *Rex v. Morton, Andrews*, 276; *Rex v. Great Broughton*, 5 Burr. 2,700.



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not, by the general rule of law, liable. But there will be no difficulty \*in compelling the repair of old roads in such places. These roads must have been repaired by somebody; and proof of such repairs under an indictment, properly charging them, will oblige the persons who have repaired them to continue to do so. A case in Siderfin has been referred to, which is so loosely reported that it is difficult to understand it; I, however, collect from that case that an indictment against the hundred for not repairing a road, was bad; but as the hundred had pleaded to it the court would not quash it. This case cannot be considered as an authority in favour of the indictment before us, but rather against it.†

*Judgment reversed.*

† The same case is reported in Keble, 274, 498, 514, under the name of *Rex v. Inhabitants of Yarnton*; the report of it there is but little more intelligible than that given in 1 Sid. But it is not stated there that the defendants were the inhabitants of a hundred; on the contrary, in

p. 498, it appears that the issue was, "that the defendants ought not to repair," which was argued to be contrary to law, "the lands being laid to be in their own parish:" and in 514 it is said, that the proceeding was an issue tried by consent.

THE EARL OF CARDIGAN *v.* ARMITAGE.†

1823.

(2 Barn. &amp; Cress. 197—215; S. C. 3 Dowl. &amp; Ry. 414.)

[ 197 ]

A. being seised in fee of the manor of F. and the demesne lands thereof, and of all the coal mines lying under the manor, enfeoffed C. D. of and in certain closes, except and always reserved to the feoffor, his heirs and assigns, *inter alia*, all the coals in all or any of the said lands and premises, together with free liberty for them, the said feoffor and his heirs, and his and their assigns and servants, at all times thereafter, during the time that he (the feoffor) and his heirs should continue owners and proprietors of the demesne lands of F., to sink and dig pits, or otherwise to sough and get coals in all and every the lands and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their free will and pleasure; he, the said feoffor, and his heirs, paying to the feoffee, his heirs, and assigns, such satisfaction for the damages as two neighbours, indifferently chosen by the feoffee and feoffor, their heirs, and assigns, should from time to time award.

The heirs of the feoffor having for a valuable consideration conveyed to a purchaser in fee the manor of F. and its demesne lands, with its appurtenances, and all the coal mines under (amongst others) the lands in question, &c., it was held that the coals were, by the exception, reserved to the feoffor in fee, and therefore that they passed to the purchaser; and, also, that the latter was entitled, under the express liberty reserved, to enter upon the land, to dig pits, and get the coals, so long as he remained owner of the demesne lands.

Semble, That the express liberty is not restrictive of that which would be implied by law to get the coals, and that the purchaser would be entitled to an incidental right to get them co-extensive with his estate.

TRESPASS for breaking and entering three closes of the plaintiff, and digging pits and raising coal. Pleas, first, as to all the trespasses, that the said several closes from time whereof, &c., had been parcel of the manor of Farnley, and that Sir Thomas Danby was seised of the said manor and the demesne lands thereof, with the appurtenances, and all coal mines, &c. lying under the said manor, in fee; and that he, on the 16th January, 1649, enfeoffed the then Earl of Sussex of, among other premises, the said three several closes in the declaration mentioned, (except and always reserved unto the said Sir Thomas, his heirs, and assigns, all tithes of corn and grain arising, happening, coming, or accruing within the said several messuages and farms aforesaid, and within every and any part or parcel thereof, and also

† Cited in judgment of Lord (1871) L. R. 2 H. L. Sc. 166, 173. CHELMSFORD in *Hamilton v. Graham*, —R. C.

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[ \*198 ]

except and always reserved out of the said feoffment unto the said Sir Thomas and his heirs all the coals in all or any of the said lands, woods, grounds, and \*premises, together with free liberty for them, the said Sir Thomas and his heirs, and his and their assigns and servants, from time to time, and at all times thereafter during the time that the said Sir Thomas and his heirs should continue owners and proprietors of the demesne lands of Farnley, to sink and dig pits, or otherwise to sough and get coals in all and every the said lands, woods, grounds, and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their wills and pleasures; he the said Sir T. Danby and his heirs, from time to time, giving and paying unto the said Earl, his heirs, and assigns, such sufficient satisfaction for all such damages as he the said Earl and his heirs should from time to time sustain by reason of the digging, sinking of pits, soughing, getting, and carrying away the said coals, in all or any of the said lands, woods, grounds, and premises, as two gentlemen, neighbours thereunto, being indifferently chosen by the said Earl and the said Sir Thomas, their heirs, and assigns, should from time to time order, award, and think fit to be given and paid); to hold the said premises unto the Earl, his heirs, and assigns, for ever. By virtue of which said feoffment the said Earl became seised of the said last-mentioned premises, and, amongst other lands, of the said several closes, in which, &c., in his demesne as of fee, the said Sir Thomas continuing owner and proprietor, and seised of and in the demesne lands of the manor of Farnley, and entitled to the coals in all or any of the same premises so aliened as aforesaid, together with such liberty as thereinbefore mentioned. The plea then mentioned the death of Sir Thomas Danby on the 8th August, 1660, and that the manor and the demesne \*lands, with the appurtenances, after several mesne descents, (which were particularly set forth,) vested in one W. Danby, who, by lease and release, A.D. 1800, in consideration of a certain sum of money, conveyed the manor and lordship of Farnley and its demesne lands, with its rights, members, and appurtenances, and all the coal-mines in or under, amongst other lands, the said three several closes in which, &c.,

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to James Armitage in fee; who thereby became seised in fee of the manor, and owner and proprietor of the demesne lands, and entitled to the coals so excepted as aforesaid, together with the liberty thereinbefore mentioned. The plea then stated that James Armitage died intestate, and that the defendant, as his eldest son and heir-at-law, became seised in fee of the manor, and owner and proprietor of the demesne lands, and entitled to the coals, &c., together with free liberty for him and his servants to sink and dig pits, or otherwise to sough and get coals and culm in the said closes in which, &c., and to sell and carry away the same at his free-will and pleasure, paying unto the plaintiff such sufficient satisfaction for damage, &c., as two gentlemen, neighbours, indifferently chosen, should award. The plea then justified the breaking and entering the said several closes in which, &c., for the purpose of sinking and digging pits, &c.; and averred that the defendant was willing to make such satisfaction for the damage sustained by reason of the supposed trespasses, as two gentlemen, &c., indifferently chosen, should award. The second plea only justified the breaking and entering the closes, because the plaintiff had wrongfully dug and got large quantities of coal lying under the said several closes in which, &c., and had deposited the same upon the said closes, wherefore defendant entered to take them away. To these \*pleas there was a general demurrer and joinder. The case was argued at the sittings after last Easter Term.

[ \*200 ]

*Tindal*, for the plaintiff :

There are two questions raised upon these pleadings: first, whether the defendant has the right to enter and dig pits to get and take the coals; and, secondly, whether the defendant has the right to the coals themselves if he can get them without digging pits. As to the first point, the defendant has no right, under the express liberty reserved by the deed, to enter and dig pits, because it appears by the plea, that the heirs of Sir Thomas Danby have ceased to be owners and proprietors of the demesne lands of Farnley, and the liberty of entering to dig pits is limited expressly to the time during which the feoffor and his heirs should continue owners of the demesne lands. The right

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to enter, therefore, became extinguished when the heir of Sir Thomas Danby ceased to be owner of the demesne lands. In order to make it continue longer, it must be contended that the reservation has the same meaning as if the word "assigns" were inserted in it, but the word "heirs" does not necessarily include assigns. It is true, that if there be a gift of land to a man and his heirs, this enables him to give it to his assigns; that, however, is not because assigns are included in the word "heirs," but because the donee takes a fee-simple, and the power of alienation is incident to that estate. Before the statute *Quia Emptores*, the word "assigns" was necessary to enable the party to alien although he had the fee.† It is clear, that the parties did not intend in this part of the exception to include assigns under the word "heirs;" for in the first part of the exception all tithes of corn are reserved \*to the feoffor, his heirs, and assigns, but the reservation of the coals is to the feoffor and his heirs only. It is true, that if there were a general exception of the coal to the feoffor and his heirs, the law would imply a right to get it co-extensive with the reservation; but here, an express liberty is given to get the coal only so long as the feoffor's heirs continue owners of the demesne lands, and then the maxim applies, *expressum facit cessare tacitum*. The parties, therefore, have expressly limited the duration of the privilege, and it ought not to be enlarged by implication, unless the limitation be contrary to law. When the purchase was made, the parties may have contemplated the ceasing of the disturbance occasioned by getting the coal; and the deed shows that they did so, for although the coal itself is reserved in fee, the privilege of getting it is reserved for a limited time. And such a reservation is not against law, for it is not necessarily a restriction of a previous grant, as the coal may be got without making pits in the land. And even if the coal could not be dug at all, there would not be any thing illegal in such a bargain.

[ \*201 ]

(BAYLEY, J.: Your argument must go the length of saying, that the deed gave a freehold in the coals *in futuro*.)

† *Mirror of Justices* (Selden Society, vol. 7) p. 12.

That objection would certainly apply, if part of the thing granted had been reserved; for then, as it would not pass by the livery, it would not pass at all, and the grant, as to that, would be void. But that rule is limited to things in existence at the time of the grant. Here, the privilege of entering to get coals was no part of the thing granted. It was not then in existence. A new incorporeal hereditament was then created, viz. a right to enter upon the land and to get the coals. The deed, therefore, operates as a re-grant of the exclusive right of digging coals, vesting in the grantor in fee, and determinable \*on his ceasing to be owner of the demesne lands.

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(HOLROYD, J. : You consider the right of entry as a grant, but if the coal by itself had been excepted without more, that would have given a right of entry for ever. You must therefore contend, that the subsequent exception of the liberty operates to extinguish what had been before given by law.)

Here, the parties have expressly substituted a limited right of entry for that which the law would otherwise have granted, and *modus et conventio vincunt legem*. This does not operate as a grant of a freehold in the coals *in futuro* to the feoffee and his heirs, but as a grant of a new privilege to the feoffor and his heirs for a limited time; and then, like a rent-charge granted to A. and the heirs of his body, when A. ceases to have heirs of his body, it falls into the estate. As to the second point, the exception of the coal is as much limited as the liberty to get it, and it operates not as a reservation of a fee-simple absolute in the coal, but as a reservation of it so long only as the grantor and his heirs should remain owners of the demesne lands of Farnley; or in other words, as a reservation of a fee-simple in the coal, qualified as to the time of its duration. A grant to a man and his heirs, tenants of the manor of Dale, Co. Litt. 27 (b); or so long as John a Downe has issue of his body, 7 Ed. IV. 12; or so long as such a tree shall stand, 27 Hen. VIII. 29, pl. 20; or so long as I. S. has heirs of his body; or so long as Bow Church stands; or as long as J. S. lives: *Idle v. Cooke*; † are

† 2 Ld. Raym. 1,148.

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all instances of qualified or base fees. In such cases, though the estate descends to a man's heirs, yet they have it for no longer time than is contained in the respective limitations. It is \*true that the limitation in this case taken, according to the strictest rules of grammar, applies only to the liberty of sinking pits; but taking the whole clause together, it appears clearly to have been the intention of the parties to make the two rights co-extensive. Why should the feoffor reserve the coals for a longer period than the right to get them? It cannot be supposed that he intended to reserve a right to the coals in fee, and a right to get them so long only as the ownership of the demesne lands was in him and his heirs. The whole ought to be construed as one reservation to him and his heirs, to have and get the coals during the time they should remain owners of the demesne lands; and if so, the feoffor only reserved a qualified fee in the coals determinable upon his heirs ceasing to be owners of the demesne land; and that event having happened, the estate of the feoffor is determined, and the defendant has no right to the coals.

*Littledale, contra:*

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The clause in question operates as a reservation of the right of working and digging the coals to Sir Thomas Danby, in fee. It must be construed as if it was a grant; and then it is quite clear, that it would not be necessary to have the word "assigns," in order to give an absolute fee. The first part of the clause operates as a reservation in fee of a right to the coals, and the restrictive part (which is no part of the grant) reserving the liberty to get them so long as Sir Thomas Danby and his heirs should remain owners, is void. In *Corbet's* case,† the 11 Assize, p. 8, is cited, to shew, that if land be given to one and his heirs, so long as J. S. or his heirs should enjoy the manor of D., \*these words, "so long as," are vain and idle, and do not abridge the estate. In *Hornby's* case,‡ the lessor having leased to Clifton for twenty-one years certain premises, except and reserving to the lessor for his own sole use and occupation two chambers, &c.,

† 2 Anderson, 138.

‡ 1 Anderson, 52.

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parcel of the messuage, it was held that the exception was absolute, and the words "for his own use and occupation" were vain and void words. It is true, that a different decision of that case is reported in Dyer, 264; but the report of the same case in New Bendloe, 181, agrees with that in Anderson; and the ground of the decision is stated to be, that the latter words were void, because the things excepted were not demised. The report of the case by Anderson was considered correct in the case of *Cudlip v. Rundall*.† In the latter case the lease was of certain premises, excepting a certain house called the New House, lately built, for the father of the lessor and himself, and their wives and families, but not to be let to any other person whatever; and when they did not dwell there, to be used by Rundall; and Holt, Ch. J., considered this as an absolute exception, not qualified by the subsequent words. These authorities shew that the exception operates as a reservation of a fee-simple absolute in the coals; and that being so, the law will imply a liberty to get them co-extensive with the estate reserved. And in that case the express liberty will not be nugatory; for at common law the party would have been entitled only to do what was necessary to get the coals, but, by the express liberty, the party may sell them, or carry them away in carts, or otherwise dispose of them at his will and pleasure. Now, an express liberty which goes beyond that which \*the law will imply, does not control the implied liberty. *Stukeley v. Butler*‡ is a strong authority in point. Besides, the effect of an exception is, to take that which is excepted out of the conveyance; and that being so, the right of getting the coals remains, as it was before the feoffment, in Sir Thomas Danby, in fee. Assuming, however, that the express liberty has the effect of controlling that which would otherwise exist, the defendant is within the meaning of the express liberty, for he is the owner of the coals, and also owner of the demesne lands; and construing the deed liberally, the liberty may be considered as reserved to any person being owner of the demesne lands, and of the coal, whether by descent or purchase. It must be wholly immaterial whether the party so exercising the liberty claims by descent or purchase.

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† 1 Show. 288; 4 Mod. 9.

‡ Hobart, 168.



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*Tindal*, in reply :

The authorities referred to in *Corbet's* case are not to be found ; and the only conclusion to be drawn from that case is, that a condition against alienation after a fee given is void, and that is not disputed. Here, the right to the coal and of digging pits for the purpose of getting the coal, was reserved, so long only as the heirs of Sir T. D. remained owners of the demesne lands. It has determined by the event which has happened, and the defendant, therefore, was a trespasser.

*Cur. adv. vult.*

BAYLEY, J. now delivered the judgment of the Court ; and, after stating the pleadings, proceeded as follows :

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The first plea raises two questions ; one, whether Mr. Armitage is entitled to the coals under the closes in question, he not claiming by descent under Sir Thomas Danby, but by purchase ; and the other, whether, for the purposes of getting them, he is entitled to use the means stated in the first plea. The second plea raises the former of these two questions only. Both questions depend upon the effect of the exception set out in the plea ; and the plaintiff contends, that that exception gave nothing beyond a limited right to continue, so long only as Sir Thomas Danby and his heirs should continue owners of the Farnley demesnes ; and the defendant, that it either gave an absolute and perpetual right in fee-simple to the coals, or at least that it gave the special liberty, so long as the owner of the coals should also be owner of the Farnley demesnes. The counsel for the plaintiff, if I understood him right, disclaimed all formal exceptions to the pleas, and stated the object to be, to ascertain whether Mr. Armitage had a right to the coals, and if he had, whether he had also a right to get them ; and to these questions, without considering whether there are any formal objections to the pleas, my observations will be directed. The exception in question contains the words “ except and always reserved ; ” and Co. Litt. 47 a. points out the distinction between an exception and a reservation. The former, an exception, he says, is ever of part of the thing granted, (and so says Sheppard's Touchstone, 78,) and of a thing *in esse*. The latter, a reservation, is always

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of a thing not *in esse*, but newly created and reserved out of the thing granted: “*potest enim quis rem dare, et partem rei, vel partem de pertinentiis retinere et illa pars quam retinet semper cum eo est et semper fuit.*” Another rule as to exceptions is \*to be found in Sheppard’s Touchstone, 100. “The exception is always taken most in favour of the feoffee and lessee, &c., and against the feoffor, lessor, &c. And yet it is a rule, that what will pass by words in a grant, will be excepted by the same or the like words in an exception. And it is another true rule, that when any thing is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his chapman to view them, if he desire to sell them, and he or the vendee may cut them and take them away.” And the same rule applies to grants: Plowd. 15, 16, Vin. Abr. Tres. (M a), *Hodgson v. Field*;† *Gerrard v. Cooke*.‡ The language of this feoffment is, “except and always reserved” out of the said feoffment unto Sir Thomas Danby and his heirs all the coals. The coals were part of the thing granted, part of the land, and *in esse* at the time. The consequence, therefore, according to Co. Litt. is, that if this, which in words was an exception, operated in point of law as an exception, the coals *semper cum Sir T. D. fuerunt*. They were never out of him, and without the words of inheritance, “and his heirs,” would have remained as before in Sir Thomas Danby and his heirs.§ And according to the rule I have last mentioned, from Sheppard’s Touchstone, a right, as incident, to get the coals, and to do all things necessary for the obtaining of them, would have been excepted also. It was, indeed, conceded in the argument, that if the exception had stopped after excepting and reserving the coals to Sir Thomas and his heirs, and \*had contained no words to give him an express liberty for sinking pits and doing other works to get them, the exception would have enured, without any restriction, to Sir Thomas in fee; and that he, his heirs, and assigns, would have had a right for ever, to do what should be necessary to get the coals; but it is upon the ground, that the express liberty is limited, and restrictive of the former

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† 8 R. R. 701 (7 East, 613).

§ Shepp. Touch. 100.

‡ 2 Bos. &amp; P. N. R. 109.

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exception, that the plaintiff makes his claim. The question therefore is, whether the express liberty restrains the former exception, and if it do, to what extent it restrains it. One objection which occurs is this, the pleas purport to set out the feoffment according to its legal operation; that operation is stated to be, that Sir Thomas D. excepted the coals to him and his heirs. Is it open to the plaintiff upon his demurrer, to contend that this was not the operation of the exception? Is there any instance in which a party has been allowed, upon demurrer, without setting out the instrument at large, or traversing the operation ascribed to it, to raise the question, whether the deed has the operation ascribed to it upon the pleadings? I know none; and I mention this, because if it be intended to carry this case to a court of error, it is desirable that the plaintiff should consider whether the case is at present as advantageously set out as it might be. But independently of this point, and assuming that the exception, as stated upon the pleas, is in the very words stated upon the feoffment, how stands the case? The express liberty is introduced by the words "together with," as if the intention were to increase what had preceded, not to diminish; and I take it to be a general rule, that words tending to enlarge shall not (unless the intention is very plain,) be taken to restrain: *Winter v. Loveden*.† The express liberty here, is, for Sir Thomas and his heirs, and his and their assigns and servants, during the time that he and his heirs should continue owners of the demesne lands of Farnley, to sink pits, to sough and get the coals, and sell and carry away the coals, or otherwise to dispose of them at their wills and pleasures; Sir Thomas and his heirs making such satisfaction to the Earl, his heirs, and assigns, as two gentleman neighbours, to be indifferently chosen by them, their heirs, and assigns, should award. It may be taken as clear, that an express liberty does not always control what would otherwise exist, especially if the express liberty goes beyond what would be implied. To give it a controlling power, the intention that it should have that effect must be very plain. *Stukeley v. Butler*‡ is a strong authority upon

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† Id. Raym. 267.

‡ Hobart, 168.

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this point. In that case the Earl of Sussex, as lord of the manor of Cleave, had demised certain woodlands of that manor for three lives, (excepting all timber trees,) and then he bargained and sold to one George, all the trees growing in and upon his manor of Cleave; and he covenanted, that George and his assigns, during five years, might sell and carry the trees without interruption of the Earl or any others, and might make saw-pits, and square and cut the timber upon the ground during the said term; and George covenanted to fill up the pits and make all things fair, and amend the fences that should be broken during the said term. The grant to George was general, not fixing any limit within which he was to cut the trees: he did not cut them till after five years from the time of the bargain and sale; and an action of trespass being then brought, \*one question upon a special verdict was, whether the covenant on Lord Sussex's part, that George might take the trees within the five years, should so check and control the grant that he might not take the trees after the five years; and Lord HOBART, who reports his own opinion, held clearly that it did not, but that as the trees were absolutely given, George and his assigns might take them when they would. And his opinion is founded upon two reasons which are strongly applicable to the present case. First, he says it is clear, that by the grant of the trees by tenant in fee-simple, they are absolutely passed from the grantor and his heirs, and vested in the grantee, and go to his executors or administrators; and the grantee hath power incident and implied to fell them, when he will, without any other licence, which (*i.e.* the power incident and implied) can never be restrained by a power given by the grantor in the affirmative, which grantee had before. He then cites 8 Ass. 10. and Dy. 19; and refers to the known rule, that statutes that are taken by intent, shall not by an affirmative take away a former power. The case in 8 Ass. 10 was strong. Ten marks of rent were granted to husband and wife; and if she survived, she was to have 40*s.* rent; and if the husband survived, he was to have 40*s.* rent. The wife survived; and if she should have the ten marks or the 40*s.* was the question. And upon adjournment from the assizes into bank, it was held she should have the ten marks; because the words, that she and her

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husband should have ten marks, were not restrained by the subsequent words, that she should have 40s., it not being said that she should have the 40s. and no more. In Dy. 19 b. lessor covenanted that lessee should have thorns for \*hedges growing on the land, by assignment of lessor's bailiff; and whether the lessee might take the thorns without such assignment, was the question. And it seemed to Baldwin and Fitzherbert that he might, because the law gave him the right by implication in the lease. Lord HOBART's second reason is this, that the covenant on the Earl's part had its necessary use, though it worked nothing in the restraint of the time for felling; for it gives power to dig and make saw-pits, and square the timbers there, which the grantee could not have done without such special warrant. And it contained a general warranty, that the grantee might take the timber without the interruption of any person or persons whatsoever. Apply both these reasons to the case in question; first, the exception here is by tenant in fee, to himself and his heirs; it therefore retains the coals in him and his heirs in fee-simple, with power incident and implied (as they are absolutely excepted) for him, his heirs, and assigns, to take them away when they will: and this power cannot be restrained by a special power given in the affirmative. As to the second, the special power here also hath its necessary use, for it goes beyond the incidental power which the law would imply. The incidental power would warrant nothing beyond what was strictly necessary for the convenient working of the coals; it would allow no use of the surface, no deposit upon it to a greater extent or for a longer duration than should be necessary, no attendance upon the land of unnecessary persons. It would be questionable at least, whether it would authorise a deposit upon the land for the purposes of sale, and whether it would justify the introduction of purchasers to view the coals. The express power gives great

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latitude in these respects. It authorises \*Sir Thomas and his heirs, at their will and pleasure, to dig pits and sough, to sell and carry away, or otherwise to dispose of. It removes the question, upon the making a new pit or sough, whether such pit or sough was necessary: it allows the selling and carrying away, or otherwise disposing of; and consequently warrants a deposit

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and continuance upon the land for the purposes of sale, and authorises the introduction of customers for the purposes of sale. It has, therefore, its necessary use, in the language of Lord HOBART, though it work nothing in restraint of the incidental right which Sir T. D. and his heirs would otherwise have had. This case, therefore, is, as it seems to me, a strong authority against the point for which the plaintiff contends, the narrowing and restraining the general exception by the words of the express power; and the case of *Hodgson v. Field*† is also a strong authority to the same effect. There, liberty was granted to carry a sough to a colliery, and to make two sough pits in given parts to carry up the tail of the sough: those pits were accordingly made; and after some time a new pit being necessary to repair the sough, the grantee made it, and trespass was brought against him. It was urged for the plaintiff on demurrer, that the special privilege of making the two pits in the places specified superseded the right to make any other pits: but the court held clearly that it had no such effect; that the right of repairing was incident to the grant; and that as it was not specially restrained, the grantee was entitled to do whatever was necessary for such repairs; and the pit in question being necessary, the defendant was warranted in making it. \*But whether the express liberty in this case has or has not restrained the incidental right, we are of opinion, that upon the true construction of the deed, even if we are at liberty to assume that the plea stated its very words, the express liberty is still a subsisting liberty; and that, under that liberty, the first justification may well be supported. It cannot be collected from the feoffment that it was the intention of the parties to limit and restrain the liberty to the period that the Farnley demesnes should continue in the heirs of Sir Thomas in a course of descent. To restrain what is *primâ facie* unlimited, the words should be plain and the intention clear. The limitation in the express power in this case is, during the time that Sir Thomas D. and his heirs should continue owners and proprietors of the demesne lands of Farnley; and the question immediately occurs, what is meant by the expression "Sir Thomas D. and his heirs?" If these words are used in the most

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† 8 R. B. 701 (7 East, 613; 3 Smith, 538).

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restrictive sense, the liberty would end the moment the demesnes were diverted from a course of descent; and what the law generally leans against, viz. a restraint upon alienation, would, without any very clear motive, be encouraged. The moment a settlement or a devise was made, the course of descent would be broken, and the liberty would cease. Can any rational ground be suggested for such a provision? If the object were to secure the working out the mines within some reasonable time, why not specify the period? why leave its continuance to an event which might not happen for many generations, or might occur within the shortest space? why put so capricious a check upon the ordinary arrangements applicable to estates? If the word "heirs" is used in this sentence in its ordinary extensive sense, \*and in the sense in which it would *primâ facie* be taken in the exception, to Sir Thomas and his heirs, it would include assigns as well as heirs; the express power would continue as long as the coals and the demesnes belonged to the same person, whether by descent from Sir Thomas or by purchase, and would therefore still be a subsisting power; and it is in this sense, we are of opinion, the words were intended to be used. The stress laid in the argument upon the insertion of the word "assigns" in some parts of this feoffment, and the omission of it in others (assuming that the pleas state the very words of the feoffment) appears to us to furnish no solid or safe ground to regulate our decision. It is inserted in the exception as to the tithes; but it is uselessly inserted there. Without that word the exception would have enured, not merely to Sir Thomas and his heirs, but to his and their assigns. It is omitted in the exception, as to the coal: it was unnecessary there; and why may not the framer of the deed have credit for knowing that it was useless? Is it a safe rule of construction to say that the introduction of an useless word in one clause and the omission of it in another will justify the putting different constructions upon the two clauses? Because an useless word is inserted in one clause, is it necessary to insert it in every other which is intended to have the same effect? There are, however, other parts of this feoffment, which shew how unsafe it would be to act in this case upon the omission or the insertion of the word "assigns." The liberty of working is to

extend to Sir Thomas, and his heirs, and his and their assigns and servants, and compensation is to be made for the damage to be done; but though the damage may be done by the assignee of Sir Thomas, or of his heirs, there is no provision in terms for satisfaction \*by such assignee, but the satisfaction is, according to the words of the feoffment, to be by Sir Thomas and his heirs. Again, satisfaction is to be paid to the Earl, his heirs, and assigns, but for what damages? for such damages as he and his heirs should sustain. So that if the Earl were to alien in fee, and his alienee were to sustain damage, there would be no words, were the letter to be adhered to, to give him satisfaction, because the damages would not be sustained by the Earl or his heirs. This is sufficient to shew that no safe reliance can be placed upon the insertion or omission of the word “assigns,” and furnishes ground for supposing that the word “heirs” is used in its larger sense, so as to include assigns. Upon the whole, therefore, we are of opinion, that the defendant, Mr. Armitage, is entitled to the coals: and if he is not entitled to the incidental right of getting them, we think that he is still entitled to the liberty expressly reserved by the feoffment, because the defendant, to whom the coals belong, is also owner of the demesnes; and though they have not come to him by descent from Sir Thomas, we are of opinion that the liberty is not confined to those who take by descent, but enures also to those who take by purchase. The consequence is, that upon both the pleas there must be judgment for the defendant.†

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*Judgment for defendant.*

† See in 2 Cruise's Dig. tit. xiii. c. 2, ss. 6, 7, 8, the cases where persons, having an interest in a condition,

or in the land to which it relates, may perform the condition, although not named in it.



1823.

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THE KING *v.* MOSLEY, BART.

(2 Barn. &amp; Cross. 226—227; S. C. 3 Dowl. &amp; Ry. 385.)

By the Manchester and Salford Police Act, 32 Geo. III. c. 69, rates were to be made upon "the tenants or occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens or garden-grounds, and other tenements situate within the towns of M. and S. respectively:" Held, that the owner of certain markets kept in the streets of M., in which various articles were exposed to sale, by persons who paid him for that privilege, but had not any stalls fixed to the ground, was not the occupier of a tenement within the meaning of the Act; and therefore was not liable to be rated in respect of the profits of the markets.†

UPON an appeal against a rate made on the defendant under the Manchester and Salford Police Act, 32 Geo. III. c. 69 (local), in respect of "market sites, streets, lands, and tenements, at the market-place, Shude-hill, Smithy-door, and at various other streets in Manchester, and the tolls, dues, rates, and profits in respect thereof." The Sessions confirmed the rate, subject to the opinion of the Court on the following case. "The assessment and rate appealed against were duly made and allowed according to the requisites of the Act. The markets for which the rate was imposed are held in the several places named, which are public streets in Manchester, and the public have a right to pass and repass over the same, subject to the right of holding the said markets by the appellant. The appellant is lord of the manor of Manchester, and owner of the markets there, and of all the waste lands within the manor. The emoluments received by him are collected by and paid to him, from the persons using the said markets and the sites thereof, for the privilege of exposing to sale there the commodities in which they deal. The baskets, sacks, tubs, and stalls, used by such persons in the said markets, are \*provided by themselves, and are either carried by them, or are placed upon the pavement of the said markets, but are not fastened to the ground."

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*J. Williams* and *Starkie*, in support of the order of Sessions, contended that the word "tenement," as used in the Act in question, was large enough to embrace the subject-matter of this

† See same principle applied in *Reg. v. Nevill* (1846) 8 Q. B. 452.—R. C.

rate. But the Court said, that the meaning of the word "tenement," as used in this Act, had been under their consideration on a former occasion; and that they were satisfied that it was intended to be applied to those things only which were *ejusdem generis*, with those particularly enumerated, and was not intended to be used in the larger sense sometimes given to it; that the subject of the present rate, not being of the same nature as any of the descriptions of property specified in the Act, was not liable to be rated; and that the order of Sessions confirming the rate must therefore be quashed.

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*Order of Sessions quashed.*

*Littledale and Park* were to have argued against the rate.

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IN THE MATTER OF BLANSHARD, BAXTER AND OTHERS.

1823.

(2 Barn. & Cress. 244—249; S. C. nom. *Baxter v. Blanshard*,  
3 Dowl. & Ry. 177.)

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The Court of Admiralty have, in a cause of possession, jurisdiction to take a vessel from a mere wrong-doer and to deliver it to the rightful owner.†

*EVANS*, in Easter Term, had obtained a rule *nisi* for a prohibition to restrain the Court of Admiralty from proceeding in this cause. It appeared by the affidavits, that, in October, 1821, the ship *Partridge*, then being at Bombay, was sold by public auction, by order of Beetham the captain, to a native merchant there. Beetham deposited the certificate of the registry with the collector of the customs at Bombay, and caused the same to be cancelled. Baxter and Osborn purchased the ship of the native merchant and repaired her. She arrived in London in July, 1822, and Blanshard claimed her, and instituted a suit in the Court of Admiralty, for the purpose of recovering possession of the ship, in a cause of possession, and by virtue of a warrant, issued by the authority of the Instance Court, the ship was arrested. A copy of the proceedings in the Admiralty Court was annexed to the affidavit; and it appeared by them, that the proctor of Baxter and Osborn asserted them to be the owners of

† See now also 3 & 4 Vict. c. 65, s. 4; 24 Vict. c. 10, s. 8, and Judicature Acts.—R. C.

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BLANSHARD, the ship, in the presence of Blanshard's proctor, who alleged, that in 1820, Blanshard, being the sole registered owner of the ship, and having an intention of fitting her out on a voyage to Madras and Calcutta, appointed one Beetham to the command, and directed him to proceed to Madras and Calcutta, and to place himself and the ship and cargo there under the care of certain persons named, and to receive on board a cargo from the consignees, and to return to London; that the \*ship, being then worth 10,000*l.*, did proceed to Madras and Bengal, with a certificate of British registry, granted by the commissioners of customs to Blanshard, as sole owner; and having discharged her cargo, Beetham took in a return cargo, and while on her homeward voyage, the ship, in January, 1821, struck on a shoal, and received some damage, and in consequence put into Bombay on the 19th January. On the 16th February she was put into a dry dock for the purpose of being repaired; surveys were held, and the surveyors reported, that the vessel, when repaired, would be in a fit state to proceed to Europe, and that she was in every way sound and sea-worthy, and worthy to be repaired. Beetham, notwithstanding, countermanded the orders for the repairs, and, without any authority from Blanshard or his agent, requested Baxter and Osborn, then merchants at Bombay, to make sale of the ship, and in consequence she was sold by public auction on the 5th March for 2,050*l.*, to a native merchant there. Within two days after such sale, Baxter and Osborn declared themselves to be the purchasers, and Beetham executed to them a bill of sale; it was further alleged by Blanshard's proctor, that when the ship was put up to sale, Baxter knew that Beetham had no authority to sell, and that the sale was illegal and unnecessary, and that within nine days after the sale, the ship having undergone the necessary repairs, was, by Baxter, advertised for a voyage to England, but was in fact sent on a voyage to China and afterwards to England, where she arrived on the 24th July, 1822, The necessary repairs might have been done for 1,000*l.*, and the money for that purpose might have been raised at Bombay by hypothecation and on bottomry. Blanshard's proctor then prayed the Judge \*to dismiss the bail given in the cause, and to condemn the other party in expenses.

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*Scarlett and F. Pollock* shewed cause :

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It appears from the affidavits and proceedings in the Admiralty Court, that Blanshard being the sole registered owner of the vessel, Baxter and Osborn have wrongfully got possession of it; the latter do not appear to claim any title to the ship, *non constat* therefore, that the Court of Admiralty will be called upon to adjudicate upon such title. There is no ground, therefore, for a prohibition, because it is quite clear that the Court of Admiralty have jurisdiction to take a vessel out of the possession of a mere wrong-doer and deliver it to the rightful owner.

*Evans, contra :*

The Court of Admiralty have no jurisdiction in this case, because the contract for the sale of the ship was made upon the land, and not upon the high sea. *Bridgeman's* case† is precisely in point. In the *Spanish Ambassador's* case‡ “it was resolved by the whole Court that the Admiralty can hold no plea of any contract but such as arises upon the sea, although it arise upon any continent, port, or haven, out of the King's dominions, for the jurisdiction is limited by the statutes to the sea only. And if the cause arise at land, or in a port, (for no port is part of the sea but of the continent,) then he cannot sue in the Admiralty Court, but must sue in the courts of common law.” *Palmer v. Pope*, § and *Don Alonso v. Cornero*, || are also authorities for this point. So where a French ship ¶ was \*taken by a Spanish privateer, and before it could reach any Spanish port, was driven by the winds into Weymouth, and sold there. The French owner sued the vendee in the Admiralty Court, on the ground that the captors were pirates. A prohibition was prayed, and FOSTER, J. and BANKS, Ch. J. were of opinion that there ought to be a prohibition, because the sale had been on the land. The case of the *Barbara*, †† *Velthasen v. Ormesley*, ‡‡ *Sands v. Child*, §§ are authorities for the same position.

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† Hob. 11.  
‡ Hob. 78.  
§ Hob. 79.  
|| Hob. 212.

¶ Marsh. 110.  
†† 4 Rob. 1.  
‡‡ 3 T. R. 315.  
§§ 4 Mod. 176; Sir T. Raym. 489.

In the Matter of **BLANSHARD.** (BAYLEY, J.: It does not appear by the proceedings in the Court of Admiralty, that Baxter has ever put in issue the right to the property of the vessel. If he had pleaded that the ship was his, and not Blanshard's, your argument might apply. But as far as the proceedings go, Baxter appears to be wrongfully in possession of a ship belonging to Blanshard, and the latter may have instituted a suit against Baxter, for the express purpose of preventing him from carrying the vessel out of the kingdom.)

In *Powell v. Robinson*,† the Admiralty had granted a warrant to seize a ship, and before any libel was exhibited, a prohibition was moved for, and it was objected that it ought not to go, because it did not appear that the Admiralty had no jurisdiction, but the prohibition was granted.‡

ABBOTT, Ch. J. :

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As far as the affidavits inform us of the proceedings in the Court of Admiralty, it appears that a suit had been instituted there by Blanshard, and that the ship had been seized by virtue of a warrant issued in that cause. Baxter and Osborn, \*by their proctor, then claimed the vessel as owners; and the proctor of Blanshard being present, then states facts, from which it appears that Baxter and Osborn were wrongfully in possession of a vessel of which Blanshard was the registered owner, and the proceedings conclude by Blanshard's proctor praying the judge to dismiss the bail, and to condemn Baxter and Osborn in costs. In this stage of the proceedings, the proctor of Baxter and Osborn not having pleaded their title to the ship, this rule was obtained for a prohibition. We cannot say what judgment the Court of Admiralty would have pronounced upon the facts alleged; and we are not to assume that that Court would have proceeded with the cause if the proctor of Baxter and Osborn had exhibited articles, and had pleaded their title; and if we made the rule absolute for a prohibition in this case, it must be upon the ground, that the Court of Admiralty have no jurisdiction, in a mere cause of possession, to take a ship out of the power of a wrong-doer and give it to the right owner. Such a jurisdiction, however,

† Bunb. 9.

‡ See *Roberts v. Cudd*, Bunb. 247.

has been exercised by that Court for a very long period of time. It has been the constant practice in disputes between part-owners as to the employment of the vessel, where the majority in value of the shareholders are desirous to send the vessel on a voyage to which the minority will not consent, for the Court of Admiralty to arrest the ship at the instance of the latter, and to take from the majority a stipulation in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares. Although the jurisdiction of the Admiralty in such cases was once \*doubted, there are several authorities † recognising it; and it may now be taken to be settled, that in disputes between part-owners as to the employment of a ship, the Court of Admiralty may arrest and detain the ship, until security be given to the amount of the value of the shares of those part-owners who dissent from the particular employment. Now as part-owners of a vessel have a distinct, although undivided, interest in the whole vessel, they cannot be considered as absolute wrong-doers by the act of using a vessel of which they are proprietors. If, therefore, the Court of Admiralty have jurisdiction to detain the vessel at the instance of one part-owner, until the others give security to the extent of their shares, *à fortiori*, it must have such a jurisdiction to detain the vessel in a suit instituted by the real owner against a mere wrong-doer; and I must observe, that this proceeding, by which the thing itself is taken out of the possession of a wrong-doer, and put into that of the right owner, is a most useful part of the jurisprudence of the country. Unless it were allowed, a ship-owner might, in many cases, sustain a serious injury and be without any remedy; for if he could only sue the wrong-doer, the latter might be unable to pay the value of the ship, and might, pending the suit, send it out of the country. Inasmuch then as it does not appear by the proceedings, that the Court of Admiralty are about to determine any question over which they have not jurisdiction, I am of opinion that this rule must be discharged.

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*Rule discharged.*

† See the cases collected in Abbott on Shipping, part 1, chap. 3, ss. 4, 5.

## K. B. MICHAELMAS TERM.

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CLARK *v.* THE INHABITANTS OF THE  
HUNDRED OF BLYTHING.

(2 Barn. & Cress. 254—256; S. C. 3 Dowl. & Ry. 489; 2 L. J. K. B. 7.)

Where the owner of certain stacks of hay and corn, which were maliciously set on fire, received the amount of his loss from an insurance office: Held, that he might nevertheless maintain an action against the hundred on the 9 Geo. I. c. 22.†

CASE on the 9 Geo. I. c. 22, to recover from the hundred satisfaction and amends for certain stacks of hay and corn which had been wilfully burnt, in the hundred of B., by some person unknown. The declaration stated the damage to have been done within one year before the commencement of the action; that within two days after the committing of the offence, the plaintiff gave notice of it to three of the inhabitants of H., that being a town near the place where it was committed; and within four days after such notice was given, plaintiff gave in his examination before a magistrate of the county, residing in the hundred of B., by which it appeared that the said stacks were set on fire by some person unknown; and that plaintiff did not know the person who committed the said act. Averment, that six months and more had expired, and that the offender had not been

† This Act is repealed as to England by 7 & 8 Geo. IV. c. 27, and as to India (so far as formerly applicable in the Supreme, now High, Court jurisdictions) by 9 Geo. IV. c. 74, s. 125. The enactment of 49 & 50 Vict. c. 38, s. 10, which replaces the analogous provisions of the Riot Act, 1 Geo. I. st. 2, c. 5, is curiously framed so as to relieve the rates at the expense of an insurer, unless (perhaps) the insurer should decline to pay pending the claims against the rates. It seems, however, necessary to retain the above case to explain the references to it in other cases where claims for damages by trespass or negligence, and claims upon contracts of indemnity arise out of the same occurrence.

See *Yates v. Whyte* (1838) 4 Bing. N. C. 272, where the case in the text and the case of *Mason v. Sainsbury* there referred to are discussed. And see the same principle applied in *Bradburn v. G. W. Ry. Co.* (1874), L. R. 10 Ex. 1; 44 L. J. Ex. 9; *Simpson v. Thomson* (1877) 3 App. Cas. 279. See also *North British and Mercantile Ins. Co. v. London, Liverpool, and Globe Ins. Co.* (1877) 5 Ch. Div. 569; 46 L. J. Ch. 537; *Darrell v. Tibbitts* (1878) 5 Q. B. Div. 560; 50 L. J. Q. B. 33. Compare the case where the insurers were expressly excluded by statutory enactment from the benefit of compensation under an award: *Burnand v. Rodocanachi* (H. L. 1882) 7 App. Cas. 333.—R. C.

apprehended or convicted. Yet the inhabitants of the hundred of B. had not, although often requested, made full or any satisfaction or amends to plaintiff for the damage and injury by him sustained as aforesaid, to the damage of plaintiff 200*l*. Plea, not guilty. At the trial before Bosanquet, Serjt. at the last Suffolk Assizes, all the allegations in the declaration were proved, but it appeared that the plaintiff's premises and stock had been insured, and that he had received from the insurance office the amount of his loss, and it was contended for the defendants, that under these circumstances the plaintiff was not \*entitled to recover. The learned Serjt. overruled the objection, but gave the defendants leave to move to enter a nonsuit. The plaintiff having obtained a verdict,

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*Storks* now moved accordingly :

The plaintiff in this action having received from the insurance office the amount of his loss, had not, at the time when the action was brought, sustained any damage by the fire. To allow him to recover in this action, would therefore be contrary to the words and policy of the 9 Geo. I. c. 22, s. 7, upon which the action is founded. That section enacts, that the hundred shall make satisfaction and amends to every person for the damage that he shall have sustained by the setting fire to any stack, &c. by any offender against that Act. It is manifest that the Legislature there contemplated a reparation to the party injured alone, and not to any third person who might have insured his premises. So also in the 3 Geo. IV. c. 33, ss. 3 & 4, which regulate the mode of recovering the damages occasioned by offences against the 9 Geo. I. c. 22, the Legislature evidently speak of a recovery by the party whose property is injured or destroyed. In *Hyde v. Coggan*† the 1 Geo. I. st. 2, c. 5, and 9 Geo. I. c. 22, are said to be remedial, to relieve the party injured by the unlawful act. In this case the plaintiff has not sustained any injury, having received the amount of his loss from the insurers, and they cannot sue the hundred in his name. There is indeed a case mentioned in Marshall on Insurance, *Mason v. Sainsbury*,‡ in

† 2 Doug. 699.

‡ See also 3 Dougl. 60.



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which a contrary opinion appears to have prevailed. That was an action of the 1 Geo. I. st. 2, c. 5, the plaintiff \*had recovered the amount of his loss from an insurance office, for the benefit of which the action was brought in the plaintiff's name, and with his consent; and this Court held that the action was maintainable. That case, however, does not appear to have undergone much discussion, and as there is not any other to be found bearing on the point, it is certainly worthy of further consideration.

ABBOTT, Ch. J. :

The point upon which this motion has been founded was decided in this Court many years ago by the case of *Mason v. Sainsbury*. Unless there be some serious doubt as to the propriety of that decision, we ought not now to disturb it. I cannot bring myself to entertain any doubt of its propriety. It is plain that the intent of the Legislature in this Act, and others of the like nature, was to make the inhabitants of hundreds vigilant for their own sakes, by making it their interest to prevent the commission of offences, and where that could not be done, to exert themselves to bring the offenders to justice. The Act in question has provisions applicable to both those objects; the 7th section renders the inhabitants of the hundred liable to make amends for the loss or damage sustained; but the 9th section provides, that they shall not be liable if the offender be apprehended and convicted within six months after the offence committed. For these reasons, independently of any question as to the competency of the defendants to set up as a defence a contract entered into between third persons, I am of opinion that the principle of the Act fully justifies the former decision, and that we ought now to abide by it.

*Rule refused.*

THE KING *v.* D. W. HARVEY AND CHAPMAN.†

(2 Barn. &amp; Cress. 257—270; S. C. 3 Dowl. &amp; Ry. 464; 2 L. J. K. B. 4.)

1823.

Nov. 8.

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A libel imputed that his Majesty laboured under mental insanity; and it stated that the writer communicated the fact from authority. Upon the trial of the information, the publication of the libel was proved. It was admitted by the defendants that the statement in the libel was untrue, and they did not offer any evidence to shew that they had any authority for making it; and the Judge in his charge to the jury having stated that it was a criminal act to assert falsely of his Majesty or of any other person that he was insane, and it being admitted by the defendants themselves that the fact stated in the publication was false, in his opinion it was a libel: Held, that this direction was correct in point of law, and that the Judge was warranted in saying that the defendants had admitted the charge contained in the libel to be "false;" for assuming that there might be a distinction between a mere untruth and a criminal untruth, and that the term "false" applied only to the latter, still as the defendants had stated that they communicated the fact from authority, and had not proved that they had any such authority, they must have been guilty of a criminal untruth or falsehood by stating as a fact, the knowledge of which they had derived from authority, that which was untrue, and for which they had no authority.

The jury having retired for a considerable time, returned into court, and desired to know whether it was necessary that there should be a malicious intention in order to constitute a libel; to which the Judge answered, "The man who publishes slanderous matter calculated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to shew the contrary:" Held, that this answer was correct in point of law, and that the Judge was not bound to answer in the affirmative or negative the abstract question put to him; and, assuming that a malicious intention is necessary to constitute a libel, that intention is to be inferred from the mischievous tendency of the publication itself, unless the defendant shews something to rebut such inference; and therefore that the publication of a libel of mischievous tendency having been proved, and the defendant not having shewn that he published it from authority, the jury were bound to find that he published it with a malicious intention.

THIS was an information filed by his Majesty's *Attorney-General* against the defendants, for a libel, contained in a newspaper of which the defendant Harvey was the proprietor, and the other defendant the printer and publisher. The libel was the leading article in the paper, and headed "Latest Intelligence—The King," and began in the following words: "Attached as we

† Cited in the judgment of Lord (C. C. R. 1895)'95, 1 Q. B. 758, 762; RUSSELL, Ch. J., in *Reg. v. Munslov* 64 L. J. M. C. 138, 142.—R. C.

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sincerely and lawfully are to every interest connected with the sovereign, or any of his illustrious relatives, it is with the deepest concern we have to state, that the malady under which his Majesty labours is of an alarming description. It is from authority we speak." The libel then stated several facts relating to the King's illness, and concluded by alleging that his disorder was of an hereditary description. At the trial before \*Abbott, Ch. J., at the London sittings after last Term, the publication of the libel was proved in the usual manner; and it was admitted by the counsel for the defendants, that the libel imported that the King laboured under insanity, and that that assertion was untrue; but it was urged to the jury that the defendants believed the fact to be true, and that they were warranted in so doing by rumours which had been very prevalent on the subject. The LORD CHIEF JUSTICE, in his address to the jury, after stating the import of the publication, proceeded as follows: "To assert falsely of his Majesty, or of any other person, that he labours under the affliction of mental derangement, is a criminal act. It is an offence of a more aggravated nature to make such an assertion concerning his Majesty than concerning a subject, by reason of the greater mischief that may thence arise. It is distinctly admitted by the counsel for the defendants, that the statement in the libel was false in fact, although they assert that rumours to the same effect had been previously circulated in other newspapers. Here the writer of this article does not seem to found himself upon existing rumours, but purports to speak from authority; and inasmuch as it is now admitted that the fact did not exist, there could be no authority for the statement. In my opinion the publication is a libel calculated to vilify and scandalize his Majesty, and to bring him into contempt among his subjects. But you have a right to exercise your own judgment upon the publication, and I invite you so to do." After the jury had retired about two hours they returned into Court, and the foreman said that the jury wished to have the opinion of the LORD CHIEF JUSTICE, whether it was or was not necessary that there should be a malicious intention to constitute a libel. To this question \*the LORD CHIEF JUSTICE returned the following answer: "The man who publishes slanderous matter, in its nature cal-

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culated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to show the contrary. There may indeed be innocent publications of that which, in its own nature, is injurious to another, as, for instance, the delivery of a book containing libellous matter to a magistrate; but the general rule is, that a person must be taken to have intended to do that which his act is calculated to effect." The jury again retired for about three hours, and then returned a verdict of guilty; but recommended the defendants to mercy.

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*Denman* and *Brougham*, for the different defendants, now moved for a new trial, upon the ground of misdirection; and they made three points: First, that the LORD CHIEF JUSTICE had stated to the jury, that the defendants' counsel had admitted the statement in the libel to be false in fact, using that word to denote a criminal untruth. Secondly, that the question put by the jury, on their return into Court, had not been distinctly answered; and, thirdly, that the observations made by the LORD CHIEF JUSTICE, by way of answer to that question, were calculated to mislead the jury. As to the first point, the fact imputed by the libel was admitted to be untrue, but not to be false or untrue in the knowledge of the defendants; for it was urged to the jury that the defendants believed the fact, and that they were warranted in so doing from the rumours which had prevailed very generally. The fact of such rumours having existed might be within the knowledge of the \*jury themselves, and might, at all events, be collected from the terms of the publication itself. The mere untrue assertion of a fact is not in all cases criminal. Where a master is called upon to give the character of a servant, the assertion must be malicious as well as untrue to make it criminal. Here the impression conveyed to the minds of the jury was, that the defendants had admitted that they had asserted a fact which they knew to be false. In *Haycraft v. Creasy*,† where the plaintiff, a person in trade, made an inquiry concerning the credit of another, and the answer was, that he might safely be credited, and that he (the person giving

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† 6 R. R. 380 (2 East, 92).

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the information) spoke this from his own knowledge and not from hearsay ; it was held that the assertion of knowledge meant no more than a strong belief, grounded upon what appeared to the party to be reasonable and certain grounds. The words used in this case are not stronger than those in the case cited.

(BEST, J. : There fraud was the gist of the action ; and, therefore, it was necessary to shew, not only that the statement was untrue, but that it was made *malo animo*.)

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Secondly, the abstract question put by the jury was not distinctly answered. They were not told whether a malicious intention were or were not necessary to constitute a libel. They appear to have thought correctly in the first instance that, although the fact asserted in the libel was untrue, yet it was not criminal, unless it were malicious as well as untrue, and the question ought to have been answered distinctly in the affirmative or the negative ; for in consequence of the answer which was given, they may have been induced to think that it was wholly immaterial whether the intention was malicious \*or not. They may have founded their verdict upon the circumstance of the assertion being untrue, although they may have been of opinion from facts within their own knowledge, and from the import of the publication itself, that the defendants had only repeated that which had been publicly rumoured, believing it to be true at the time when they published it. It was laid down to the jury as a presumption of law, that malice was to be inferred from the mere fact of publication, whereas that is only one of the circumstances from which they may be warranted in drawing a conclusion of fact. The question of malice is in all cases a question of fact, to be collected from the evidence before the jury.

(BAYLEY, J. : I take the law to be that where a particular consequence necessarily results from any act, the party doing the act is to be considered as *primâ facie* intending the necessary consequence of that act. Thus in *Rex v. Farringdon*, M. 1811, the indictment was for setting fire to a mill, with intent to injure the occupiers thereof. The indictment was not preferred until above eighteen months after the offence was committed, so that

it could not be supported on the 9 Geo. III. c. 29. The prisoner was of weak intellects, but not in such a state as to be entitled to an acquittal for want of reason. A point reserved was, whether, under 43 Geo. III. c. 58, it was not necessary to give some evidence of an intent to injure, beyond the mere act of setting fire; but the Judges were unanimous that the prisoner must be taken to have intended that which was the necessary consequence of his act, and the conviction was held right. In *Rex v. Mazagora*, Easter, 1815,† the indictment was for disposing \*of forged bank notes, the intent was charged to be to defraud the bank. The jury found the prisoner guilty, but that the intent was, to defraud any person who might take the notes; and that the intention of defrauding the bank in particular did not enter into the prisoner's contemplation. On case, the Judges thought the matter too clear for discussion, and that the prisoner must be taken to have intended to defraud the bank, and that the conviction was right.)

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*Eldridge v. Knott*,‡ and *Doe dem. Fenwick v. Reed*,§ are authorities to shew that the presumption of title from length of possession is a question of fact for the jury. Besides here, too, it was laid down, that the malicious intention was to be inferred unless the contrary was proved; and that the onus of *proving* the contrary lay upon the defendant. Now, the jury may have been led to believe that it was necessary for the defendant to produce oral or documentary proof to rebut the presumption of malice, and if they so understood it, they might thereby be induced to convict the defendants, although from facts within their own knowledge, and from the publication itself, they may have been of opinion that the defendants published it *bonâ fide*, believing the facts stated to be true.

BAYLEY, J. :

It appears to me, that this case was properly presented to the consideration of the jury in the first instance; and that the

† The learned Judge read both these cases from a manuscript. The first of them is to be found in 2 Russell, 1675, and the other in

Bayley on Bills of Exchange, 443.

‡ Cowper, 215.

§ 24 R. R. 338 (5 B. & Ald. 232).

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answer given by my LORD CHIEF JUSTICE to the question put to him by the jury was perfectly correct. Assuming it to be a question of fact whether the jury were to infer malice or not, the evidence upon that point was all one way ; and that being so, it was the duty of the jury to act upon that evidence \*and find the defendants guilty. It is impossible to form an accurate judgment of the direction to the jury, without adverting to the terms of the libel itself. It contains not merely an assertion of a fact which a party may suppose to be true, and with respect to which he assumes to have had only ordinary means of knowledge ; but it is such an assertion, that if it were a *bonâ fide* assertion, the means of proving it to be so must be within the writer's own power. He does not merely say that such a fact exists, but he assumes to speak from authority. It is conceded, that to state falsely of his Majesty that which is stated in this publication is a libel. If it be not so, the objection will be upon the record, and may be taken advantage of either upon writ of error or by a motion in arrest of judgment. But, as at present advised, I am of opinion that falsely making that assertion was evidence that the party made it maliciously. A distinction has been made between an untrue and a false assertion, and it has been argued, that if a party assert a particular fact, believing that the fact exists when it does not, although that be an untrue assertion, yet there is no criminality in it ; but that if he assert that which he knows to be untrue, that is a criminal untruth or a falsehood. Assuming that that is a well-founded distinction, I think that if a party knowing a fact not to be true, or not having the means of knowing whether it be true or not, takes upon himself to assert that it is so, then he makes a false assertion, or is guilty of a criminal untruth, if it turns out that his assertion is unfounded. In the one case the criminality consists in asserting that which he knows not to be true ; in the other he is making an assertion unwarrantably, when he does not know whether it be true or not. There are authorities to shew, that

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\*if a man will take upon himself to swear to a thing when he does not know whether it be true or false, he is liable to be indicted for perjury, if his testimony prove to be false. Now, is the assertion in this case to be considered false or not, in the

latter sense of the word? A party making such an assertion may or may not have the means of knowing the state of his Majesty's health; but here, the writer takes upon himself to state that he has authority for stating such and such facts. Now, if he had such authority, he had the means of proving it to the jury, and of shewing that the character of untruth belonged to it only, and not that of falsehood or criminal untruth; but inasmuch as he has not shewn that he had any authority for stating the fact, it must be taken that he had none, and that it was a false assertion, which disposes of one ground upon which this motion was made. Then the other question arises, whether the defendant is to be considered as having published the libel with a malicious intention. Assuming malice to be necessary in all cases to constitute a libel, I take it to be established by many authorities, to some of which I have referred in the course of the argument, that a party must be considered, in point of law, to intend that which is the necessary or natural consequence of that which he does. If I utter defamatory language of a particular person, the presumption is, that I mean to do him a mischief. My assertion of a fact defamatory with regard to him, will materially prejudice him in the eyes of all the persons who hear or read what is said of him. *The King v. Creevey*,† is a strong authority \*to shew that the answer given by my LORD CHIEF JUSTICE to the question put by the jury was perfectly correct. That was an indictment against the defendant for publishing a libel of one Kirkpatrick, an inspector of taxes. The libel purported to be an account of a speech delivered by the defendant in the House of Commons, but it was published by him as a correct report of such speech. It was objected at the trial, that there was not any proof of malice, so as to make the publication libellous. The case was tried before Mr. Justice LE BLANC, a man of great talent, accuracy, and firmness; and he was of opinion, that it was not necessary to prove malice, but that it might be inferred from the publication itself, and he told the jury that they were to look both to the matter and the manner of the publication, in order to decide whether it was libellous or not. The defendant having been found guilty, a

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motion was made for a new trial. The rule was refused, and Lord ELLENBOROUGH says, "The only question is, whether the occasion of the publication rebuts the inference of malice arising from it;" and LE BLANC, J., stated "that he had told the jury to consider whether the publication tended to defame the prosecutor, giving his opinion that it did, but still leaving the question to them; and he further stated to them that where the publication is defamatory the law infers malice, unless any thing can be drawn from the circumstances of the publication to rebut that inference." I cannot distinguish that case from the present. Here, the publication was of a matter which, if false, it is now conceded was libellous. Now this decision says, that malice ought to be inferred from the publication of defamatory matter, unless some excuse for the publication be shewn. The onus, therefore, of negating \*malice is properly cast upon the defendant; for where the natural inference from the publication is that it is malicious, the party seeking to exempt himself from such natural inference, must do it by shewing something to rebut the inference, otherwise arising from his act. Here, the defendant might have adduced evidence for that purpose; he might have shewn what his authority was. In the absence of any such evidence, I think the intention was naturally and properly to be drawn from the libel itself, and, consequently, that there is no foundation whatever for disturbing the verdict.

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HOLROYD, J. :

I am of the same opinion. This is a charge for a publication of a libellous nature, and of a description not only injurious to the individual to whom it relates, but mischievous to the public, inasmuch as it was calculated to excite great alarm in the minds of the people, as to the state of his Majesty's health. Now, if a thing in itself mischievous to the public be wrongfully done, that is an indictable offence. It is not necessary to aver in such an indictment any direct malice, because the doing of such an act without any excuse is indictable. In some cases, as in that of murder, malice is the very gist of the offence, but in larceny malice is not an ingredient. In this case, the act done was mischievous to the public. It appears, therefore, that it was not

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absolutely essential to aver malice in this indictment, or to prove it at the trial ; but it is unnecessary to discuss that point, because I think, that, upon the rules and principles of the common law, malice was to be inferred from the evidence laid before the jury, and the jury were bound, in the discharge of their duty, to act upon those rules and principles, and to apply the law to the facts before them. The publication \*in this case assumes the knowledge of the fact which it alleges. It states that the writer had it from authority, and whatever may be the import of that word, if there was any authority to justify or excuse the publication, it ought to have been shewn by the defendant. For if the matter published was in itself mischievous to the public, the very act of publishing is *primâ facie* evidence to shew that it was done *malo animo* ; for when a publication having such an injurious tendency is proved, it is intended to have been done with a malicious intention : because the principle of law is, that a party must always be taken to intend those things and those effects which naturally grow out of the act done. If, therefore, the effects naturally flowing from the act of publishing the libellous matter in this case were mischievous to the public, it follows, that the Judge was bound to tell the jury that malice was, by law, to be inferred ; and that that having been proved, which, according to the principles of law, made the inference of malice necessary, the onus of rebutting that inference was cast upon the defendant. It is said, however, that my LORD CHIEF JUSTICE was bound to answer the abstract question put by the jury, but I am of opinion that a judge is not bound to answer any question, except so far as it is material to the matter which the jury have to decide and in this case if the jury were satisfied from the answer given, that it was to be presumed that the defendant intended the consequences which would naturally follow from his act, they must at the same time have been satisfied there was sufficient proof of malice, and therefore there can be no ground for disturbing the verdict.

BEST, J. :

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The paper set forth in this information is most correctly called by it a false, scandalous, and malicious libel. We have

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been told by the defendant's counsel, that malice is the gist of this prosecution. I accede to this, but we must settle what is meant by the term malice. The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred or ill-will to an individual ; but means any wicked or mischievous intention of the mind. Thus, in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary, in support of such an indictment, to shew that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable or excusable cause. Malice, in the law relative to libels, means legal malice. The only question which the jury had to decide was, whether a paper which falsely represented that the sovereign of the country was insane and, so, incapable of discharging the duties of his office, was a mischievous paper : no men, whose minds were not disordered, could hesitate how to decide such a question. It is not possible to imagine any publication more calculated to produce irritation and disorder throughout the country, and the publishers must be taken, according to legal reasons, to have intended to produce those consequences which it was calculated to produce. The defendants were not charged with a libel published from motives of personal hatred to the King, but with a false report of the state \*of his Majesty's mind, made with a view to disturb the peace of the country. It was admitted at the trial that the libel was false, but it was at the same time insisted, that the defendants, at the time when they published it, did not know that it was false. They say they publish from authority, and thereby undertake to be responsible for its truth. But whether a publication be true or false is not the subject of inquiry in the trial of an information for a libel ; but whether it be a mischievous or innocent paper. In the position in which this case now stands it is not necessary to decide whether the defendants would have been justified had the statement been true. But it must not be taken for granted that if such a dreadful affliction had happened to the country, as the insanity of the King, the

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editor of a newspaper would be justified in publishing an account of it at any time, and in any manner that he thought proper. It is fit the time and mode of such a communication should be determined on by those who are best able to provide against the effects of the agitation of public feeling which it is likely to produce. A reasonable time should be left to the constituted authorities to give the nation such afflicting intelligence. During that time decency requires that all other persons should be silent. If such a communication should be improperly delayed, the fair liberty of the press would allow any person to call the attention of the nation to the circumstance. But such a communication, rashly made, although true, might raise an inference of mischievous intention, for truth may be published maliciously.

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ABBOTT, Ch. J. :

My learned brothers having delivered their opinion, that nothing which fell from me, in my \*address to the jury, furnishes sufficient ground for granting a new trial, it is perhaps unnecessary for me to say any thing ; I cannot, however, forbear making one or two observations. If it be true that a malicious intention be necessary to render amenable to the law a person who publishes defamatory matter,—I say that unless that malicious intent may be inferred from the publication of the slander itself, in a case where no evidence is given to rebut that inference, the reputation of all his Majesty's subjects, high and low, would be left without that protection which the law ought to extend to them. I will say further, with regard to the particular expression contained in this publication, that if any writer thinks proper to say that he speaks from authority, when he informs his readers of a particular fact, and it shall turn out that the fact so asserted is untrue, I am of opinion, that he who makes the assertion in such a form, may be justly said to make a false assertion. I am not a sufficient casuist to say that to call it an untrue assertion would be a more proper mode of expression.

[ \*270 ]

*Rule refused.*

1823.  
Nov. 10.

[ 271 ]

**ASTLE AND ANOTHER v. THOMAS AND BALDWIN.†**

(2 Barn. & Cress. 271—293; S. C. 3 Dowl. & Ry. 492; 2 L. J. K. B. 8;  
S. C. at Nisi Prius 1 Carr. & Payne, 104.)

In the parish of A., two churchwardens were elected for the township of B., and two others for the rest of the parish. Separate rates were made for these divisions: Held, that the churchwardens elected for the township of B. might maintain an action against their predecessors for money remaining in their hands, and were not bound to make all the present or late churchwardens of the parish plaintiffs or defendants.

ASSUMPSIT by the plaintiffs, churchwardens of the township of Burton-upon-Trent, in the parish of Burton-upon-Trent, against the defendants, late churchwardens of the same township, for money had and received, to the use of the plaintiffs, as churchwardens as aforesaid. Plea, by Thomas; the general issue, by Baldwin, that two other persons, J. T. and J. H. should have been sued together with him and Thomas. Issue thereon. At the trial before Park, J. at the last Assizes for the county of Stafford, it appeared that the parish of Burton-upon-Trent consists of the township of Burton-upon-Trent, for which two churchwardens have always been appointed; and also of several country hamlets, which have jointly appointed two other churchwardens. There is only one parish-church in the parish, and that is situate in the township of B. Separate rates have always been made by the two sets of churchwardens. When the defendants went out of office the sum of 18*l.* remained in their hands. J. T. and J. H. were churchwardens for the country hamlets, when the defendants were churchwardens for the township of Burton. For the defendants it was objected, that the whole body of churchwardens appointed for the parish formed but one corporate body, and that the action should have been brought by all the present against all the late churchwardens. The learned Judge overruled the objection, and the plaintiffs had a verdict for 18*l.*

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*Campbell* now moved for a new trial, and relied on the objection before mentioned. It is true, that in this parish no

† Referred to in judgment of (1866) L. R. 1 C. P. 748, 759; 35 WILLES, J. in *Brenner v. Hull* L. J. C. P. 332, 340.—R. C.

common fund was raised. The churchwardens appointed by the township of Burton, and those for the country hamlets made separate rates for their divisions respectively. But *Rex v. Gordon*<sup>†</sup> shews that there must be one rate for the whole parish, and that separate rates, by separate bodies of churchwardens, cannot legally be made.

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THOMAS.

(BAXLEY, J.: The rate there in question was a poor-rate, between which and the present there is this material distinction: there may be an immemorial custom as to a church-rate, but not as to poor-rates, which had no existence before the reign of Eliz.)

At all events the appointment of churchwardens cannot be for a township, it must be for a parish; if, therefore, the plaintiffs were sworn in, and acted for the township of Burton-upon-Trent, they were not legal officers, and if they were appointed for the whole parish, the whole body of churchwardens should have joined in the action, therefore, *quacunq̃ue viâ*, the defendants are entitled to a new trial.

ABBOTT, Ch. J.:

I think we are not called upon to enquire whether the appointment of the plaintiffs was or was not strictly legal, we must presume it to have been legal. The material part of the case is, that in this parish there were two purses, supplied by separate rates, one upon the township of Burton, the other on the country hamlets. It is no injury to the parish at large, that the money in question has not been paid over, but only to that part of it from which, and for the use of which it \*was raised. I am, therefore, of opinion, that the plaintiffs being invested with a right to the management of that sum, are entitled to maintain an action for it.

[ \*273 ]

*Rule refused.*

<sup>†</sup> 19 R. R. 376 (1 B. & Ald. 524).

1823.  
Nov. 13.

COLLEY AND ANOTHER v. STREETON AND OTHERS.†

(2 Barn. & Cress. 273—280; S. C. 3 Dowl. & Ry. 522; 2 L. J. K. B. 25.)

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Where A. held premises under a lease containing a clause of re-entry for want of repairs, and afterwards underlet a part to B., who undertook to repair within three months after notice for that purpose; the premises underlet being out of repair, A.'s landlord threatened to insist upon the forfeiture if they were not repaired, and A. gave notice to B. to repair. The premises at the expiration of three months from that time remaining out of repair, A. entered and repaired: Held, that he might recover from B. the sum expended on that occasion.

After the repairs were done by A., but before the commencement of the action, B. sold his interest in the premises to a person who pulled down and entirely rebuilt them: Held, that this did not deprive A. of his right to recover the whole sum expended by him.

ASSUMPSIT on a special agreement. The declaration stated, that by a certain memorandum of agreement, sealed with the seals of the defendants, made July 25th, 1816, between plaintiffs of the one part, and defendants, described as assignees of one S. Crane, a bankrupt, of the other part; reciting, that by an agreement, under the hand of J. Peacock of the one part, and S. Crane of the other part, bearing date March 29th, 1796, J. Peacock agreed to let unto S. Crane, and S. Crane agreed to take and rent of J. Peacock, certain premises therein mentioned, for thirty-four years, at the yearly rent of 40l.; and that S. Crane thereby agreed to keep the same in good and tenantable repair, during the said term, and that Peacock thereby agreed to grant a lease on those terms to Crane, with usual covenants, within three calendar months, and that Crane agreed to execute a counterpart thereof; reciting also, that Peacock procured a lease to be granted to him \*of the said premises, together with others, by one indenture, dated the 21st January, 1802, for a longer term than that by him agreed to be granted as aforesaid; reciting also, that Peacock afterwards granted an under-lease of all the said premises, for nearly the whole of his term therein, unto J. S. and J. J., subject to the said agreement with S. Crane, and that the same under-lease was then effectually vested in the plaintiffs; reciting

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† Compare *Williams v. Williams* C. P. 382, where there was merely a general covenant to repair.—R. C.  
(1874) L. R. 9 C. P. 659, 43 L. J.

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also, that defendants, as assignees as aforesaid, were entitled to the benefit of the said agreement entered into with Crane: the said plaintiffs did agree with the defendants, that they would, on or before the 9th of September then next, demise and lease unto defendants all the premises, by the said agreement of the 29th of March, 1796, agreed to be demised, for the residue which should then be to come of the said term of thirty-four years; and the defendants did thereby agree that they would accept such lease, and execute a counterpart: and it was mutually agreed, that in the said lease there should be a covenant, that the lessees should pay the rent, and keep and preserve the premises in sufficient and tenantable repair; and that it should be lawful for the plaintiffs to enter and view the same, during the continuance of the said term, and of all want of repair give notice at the premises; and that the lessees would make good the same, within three calendar months after such notice; and there was to be a clause of re-entry for breach of any of the covenants in such lease. And thereupon, afterwards, in consideration that the plaintiffs would permit and suffer the defendants to hold and enjoy the premises before such lease should be made, upon the terms which, by the said memorandum of agreement were to be contained in such lease, defendants undertook to do and perform all such \*things as it was agreed that there should be covenants for the lessees to do and perform. Averment, that plaintiffs did, before any lease was made, viz. from the day and year first mentioned, until the commencement of the action, suffer the defendants to occupy as aforesaid, yet the defendants, during all that time, suffered the premises to be out of repair; that plaintiffs entered and viewed the premises, and on 17th of October, in the year first aforesaid, gave the defendants notice of the want of repair, but that they did not repair within three calendar months, by reason whereof plaintiffs were obliged to lay out a large sum of money in repairing the premises. Second count, that on, &c. in consideration that defendants, at their request, had, before that time, become, and then were, tenants to plaintiffs of certain premises, they undertook to keep the same in good and tenantable repair; that they did not do so, whereby plaintiffs were obliged to lay out a large

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sum of money in repairs. Third count, same in substance ; and common money counts. Plea, general issue. At the trial before Abbott, Ch. J., at the London sittings before this Term, the plaintiffs gave in evidence the agreement set out in the first count of the declaration. Whereupon it was objected for the defendants, that the instrument therein recited, bearing date March, 1796, was a lease to Crane, and that there being a subsisting lease at the time when the new agreement was made with the defendants, the consideration for the promise laid in the first count was incorrectly stated ; the action should have been founded on the original lease. The LORD CHIEF JUSTICE observed, that it was immaterial whether the instrument were or were not a lease, as the second and third counts stated that defendants had become tenants to the plaintiffs. \*The plaintiffs then proved a lease to Peacock, with a covenant by him to repair, and a clause of re-entry for any breach of covenant, and an under-lease, with like covenants granted by him, which afterwards became vested in the plaintiffs ; they then proved that their superior landlord, on the 28th of September, 1816, gave them notice to repair the premises in question, which were out of repair ; and that on the 17th of October following, they served on defendants' solicitor notice to repair. The defendants said they were about to sell the premises, and begged that they might not be then compelled to repair. No repairs were done by them, nor were the premises sold. Plaintiffs frequently, afterwards, applied to them to repair, and said that if it was not done they would send workmen to do it ; and on the 19th of March, 1817, the plaintiffs sent workmen, who repaired the premises at an expense of 228*l.*, doing no more than was necessary to put them in tenantable repair. No express assent by the defendants was proved ; but some evidence was given to shew that they knew what was going on, and did not dissent until after the sum above mentioned had been expended. The defendants afterwards sold the premises to a purchaser, who pulled down the old buildings and entirely rebuilt them, before the commencement of this action. The LORD CHIEF JUSTICE left it to the jury to say, whether the sum expended was a reasonable sum for putting the premises in repair ; and

observed, that the plaintiffs had a right to have the premises in repair at all times during the lease; and that the subsequent rebuilding of the premises did not deprive them of a right to recover such sum as had been reasonably expended. The jury found a verdict for the plaintiffs for the whole sum expended by them.

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*Wilde* now moved for a new trial, on the ground of a variance between the declaration and the evidence, and on the ground of a misdirection by the LORD CHIEF JUSTICE as to the quantum of damages. This was an action founded on an implied contract to repair the premises which the defendants occupied; the first count set out an agreement to grant a lease, and alleged that the defendants agreed to occupy according to the terms of that agreement until the lease should be executed. The second and third counts stated that a tenancy existed. Now, if the instrument of 1796 between those under whom the plaintiffs claim and the defendants was a lease, it was still subsisting when the new agreement was entered into in 1816, and consequently the parties occupied under the first, and not under the second agreement; so that the consideration laid for the promise in the first count fails. The principle upon which to decide whether any instrument be or be not a lease, is clearly laid down in *Bac. Abr. Lease (K)*. "Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for a determinate time; such words, whether they run in the form of licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years."

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(ABBOTT, Ch. J.: Supposing it to be a lease, and that the first count was not proved, what objection is there to the second and third?)

They are both framed on an implied promise, arising out of the tenancy; whereas the promise was express, and contained in an instrument containing a variety of provisions, the whole of which, taken together, formed the consideration of the promise; the whole, therefore, should have been set out in those counts.

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(ABBOTT, Ch. J. : The instrument which you mention \*was not under seal ; it was merely evidence of a continuing promise by the person coming into possession, to perform the contract with the person who might happen to be the owner of the premises.

HOLROYD, J. : If the defendants were occupying under the terms of the original agreement, they were bound to perform the terms of it ; nor was it necessary to set out the whole of it. The obligation to repair arises out of the tenancy : the agreement shewing a tenancy was evidence to prove the promise as laid ; for, by law, the defendants as tenants were bound to keep the premises in repair.)

Then, secondly, the question of damages was not correctly left to the jury. The premises were actually rebuilt before the action was commenced ; under such circumstances, the plaintiffs could not have claimed more than nominal damages if they had not laid out their money in the repairs. But as there was not any evidence to shew that the repairs were done with the assent of the defendants, (and without such assent the plaintiffs had no right to enter for the purpose of doing them,) they ought not to be prejudiced by that circumstance. Suppose, instead of repairing the premises themselves, the plaintiffs had brought an action against the defendants for suffering them to be out of repair, and at the trial it had been proved that before the action was brought they had been completely repaired, surely nominal damages only could have been recovered.

ABBOTT, Ch. J. :

It appeared at the trial that the plaintiffs held the premises in question, together with others, under a lease. Part of those premises was let to the defendants. The superior landlord of the whole required the plaintiffs to repair that part which was in the occupation of the defendants, under a threat of an ejectment.

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\*In October, 1816, notice to repair was given to the defendants, but they did not repair. The premises were at that time unoccupied ; the defendants had put them up to sale by auction and bought them in, but were about to make another attempt to dispose of them. Application was then made to the attorney for

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the defendants, who said that they wished the landlord to suffer the premises to remain unrepaired until after the sale. The plaintiffs then gave notice, that if the necessary repairs were not done by a certain day, they would order them to be done. Under these circumstances the plaintiffs did repair at a certain expense, which, at the trial, was proved to be a fair and reasonable sum to be expended in such repairs. I told the jury that it was quite immaterial whether the action was founded on the instrument executed in 1796, or on that of 1816, because in each there was a stipulation to repair; and further, that it was not necessary for the plaintiffs to prove that the defendants assented to the repairs being done by them, because if there was no such assent, the plaintiffs would be trespassers, and liable to an action for the entry. I observed to them, that the plaintiffs were under an obligation to repair in order to preserve their own estate; and further, that as landlords, they had a right to have the estate at all times in good repair, for otherwise their reversion would be lessened in value; and I left it to them to decide whether the sum expended was or was not reasonable. They found that it was, and I cannot say that I am by any means dissatisfied with that finding.

BAYLEY, J. :

I think that this case is free from all doubt; the defendants held the premises under an obligation to repair, which they did not perform. The \*measure of the damages was properly the loss which the plaintiffs sustained, by reason of the default of the defendants. That was the sum reasonably expended by them in doing such repairs as were necessary for the purpose of avoiding a forfeiture of the lease, which they had of these, together with other premises.

[ \* 280 ]

HOLROYD, J. :

I am of opinion that there is not any ground for a new trial in this case. The plaintiffs are entitled to retain the verdict for the damages given. It is clear that they sustained a loss to that amount, in repairing the premises which the defendants ought to have repaired. Assuming that the landlords lawfully entered

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and repaired, this is quite clear, for the subsequent rebuilding was no remuneration to them. It is argued, however, that the plaintiffs had not any right to enter; but I think that they had, on the ground that they were liable to repair, and that the want of repair by the defendants was a forfeiture for which they might enter, under the provision in the agreement, that there should be a clause of re-entry for breach of any covenant in the lease contracted for, although they may be considered as having subsequently waived the forfeiture. But whatever may be the law as to that point, the plaintiffs are, at all events, only liable to an action of trespass for the entry, and may notwithstanding recover the money which they expended. This would have been quite clear, if the premises had not been afterwards pulled down and rebuilt; and I cannot see how that circumstance lessens the damages which had been then already sustained.

BEST, J. concurred.

*Rule refused.*

1823.  
Nov. 14.

# DRAYTON AND ANOTHER v. DALE.†

(2 Barn. & Cress. 293—301; S. C. 3 Dowl. & Ry. 534; 2 L. J. K. B. 20.)

[ 293 ]

The maker of a promissory note payable to A. B. or order is estopped as against a holder for valuable consideration, from pleading that an indorsement made by A. B. is void by reason of his having become bankrupt previously to the indorsement.

[ \*294 ]

ASSUMPSIT by the plaintiffs, as indorsees against the defendant, as the maker of a promissory note, dated the 22nd of September, 1818, for 50*l.*, for value received, \*payable twenty-four months after date, to one Gauntlett Clarke, or his order, and by the said G. Clarke indorsed to Messrs. Knight and Freeman, and by them indorsed to the plaintiffs. Plea, first, general issue, and secondly the bankruptcy of the said G. Clarke and one G. Whitehead the younger, by virtue of a commission of bankrupt dated and issued the 19th November, 1814, and an assignment thereupon by the commissioners to Messrs. Gibson, Wilson, and Howell, dated the 1st December, 1814, by reason of which and by force of the

† See now Bills of Exchange Act, 1882, s. 88 (2).—R. C.

statute in such cases, &c. the interest, title, and right to indorse the said promissory note in the declaration mentioned, before and at the time of the indorsement by G. Clarke, became and was vested in the said assignees, and not in the said Clarke, and thereby the indorsement of Clarke became void, and created no right in the plaintiffs to sue. The plaintiffs joined issue on the first plea and replied to the second, that after the assignment to the assignees, the indorsement of Clarke was made by him by and with the consent of the said assignees. Rejoinder denying such consent, whereupon issue was joined. At the trial, before Abbott, Ch. J., at the adjourned sittings at Guildhall, after Hilary Term, 1821, a verdict was found for the plaintiffs for 51l. 10s., subject to the opinion of the Court upon a case which stated the issuing of the commission, and the assignment to the assignees named in the plea, and that they executed a power of attorney to Clarke to collect debts, and sue in their names, &c. At the time of the bankruptcy the defendant was indebted to Clarke's separate estate in a sum much exceeding the amount for which the promissory note was given. Wilson was the sole acting assignee, and he having desired Clarke to proceed against the defendant \*for the recovery of the debt, Clarke proposed to take that debt upon his own account, and Wilson assented to that proposal. Clarke informed the defendant of this arrangement, and he gave the promissory note in question in part payment of his debt; Clarke indorsed it for a *bonâ fide* debt to Knight and Freeman, and the latter indorsed it for a valuable consideration to the plaintiffs. Neither Knight and Freeman nor the plaintiffs knew of the circumstances under which the note was given. Upon counsel being heard in a former term, the Court were of opinion that there was not any evidence that the note was indorsed by Clarke with the consent of all the assignees, and they ordered the verdict to be entered for the plaintiffs on the first issue, and for the defendant on the second issue, and that the case should be submitted for argument upon the following question, whether or not the plaintiffs were entitled to the judgment of the Court upon the whole record so framed, notwithstanding the verdict found for the defendant on the special plea.

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*F. Pollock*, for the plaintiffs :

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The question raised upon the pleadings is, whether the previous assent of the assignees is necessary, in order to enable a bankrupt to pass the property in a bill or note by indorsement. It is not alleged that the assignees claimed the property, but merely that the bankrupt had no title. It is clear, however, from a series of authorities, that an uncertificated bankrupt has an interest in property acquired after his bankruptcy, unless his assignees claim it: *Ashley v. Kell*,† *Chippendale v. Tomlinson*.; *Webb v. Fox*,§ *Fowler v. Down*,|| and *Coles v. Barrow*.¶ Besides, in this case the note was payable to the bankrupt, or his order. The defendant, by giving such a note, held out to the world that the bankrupt was capable of making an order upon the note, and therefore is estopped now from saying that he was not competent so to do.

*Chitty, contra :*

The property in the note absolutely vested in the assignees, and they took that property, not as individuals, but as trustees for the creditors; and in that character they were bound to take to the property. *Nias v. Adamson*†† is a strong authority to shew that the property actually vests in the assignees by the assignment; and *Kitchen v. Bartsch*‡‡ shews that it is immaterial whether the property came to the bankrupt before or after his bankruptcy. In that case it was argued, but without success, that the defendant, by having contracted with the bankrupt was estopped from saying that he had no title. It is true that there the assignees interfered; but *Nias v. Adamson*†† shews that that makes no difference. And it is clear that a bankrupt, after an act of bankruptcy, cannot pass the property in a bill by indorsement: *Thomason v. Frere*.§§

ABBOTT, Ch. J. :

Looking at this case as it is stated upon the record, and that

† 2 Str. 1207.

‡ Cooke's B. Laws, 406; 7th ed.

§ 4 R. R. 472 (7 T. R. 391).

|| 1 Bos. &amp; P. 44.

¶ 14 R. R. 658 (4 Taunt. 754).

†† 22 R. R. 360 (3 B. &amp; Ald. 225).

‡‡ 7 East, 53; 3 Smith, 58.

§§ 10 R. R. 341 (10 East, 418).

is the most favourable way in which it can be considered for the defendant, I am of opinion that the plaintiffs are entitled to the judgment of \*the Court. The action is brought upon a promissory note, payable to Clarke or order, and indorsed by him to a third person, and by him to the plaintiffs. The defendant pleaded, first, non-assumpsit, and, secondly, the bankruptcy of Clarke on the 19th November, 1814, and an assignment by the commissioners to the assignees, on the 1st December, 1814, and that thereby the interest, title, and right to indorse the promissory note, before and at the time of the indorsement by Clarke, became vested in the assignees and not in Clarke, and the indorsement of Clarke was void, and created no right in the plaintiffs to sue. To that plea, the plaintiffs replied, that after the assignment to the assignees, the indorsement of Clarke was made by him with the consent of the assignees, and issue was taken and joined upon the fact of such consent, and the jury having found a verdict for the plaintiffs on the general issue, and for the defendant on the other issue, the question is, whether the plaintiffs be entitled to judgment, notwithstanding the verdict found for the defendant on the second issue. It must now be taken as a fact, that the indorsement was made by Clarke without the consent of the assignees, and then the question is, whether Clarke, having made such an indorsement without the previous consent of his assignees, could thereby transfer any interest in the note to his indorsee. Now, inasmuch as the note, which is a negotiable instrument, is made payable to Clarke or his order, and it is greatly to the advantage of commerce that such an instrument should be transferable by indorsement, we ought, according to the rules and principles of law, which are framed with a view to the general convenience of mankind, to give effect to the transfer of such a negotiable instrument, unless some \*plain rule of law interfere to prevent it. Now is it a just conclusion of law, from the facts stated in the plea, that the right and title to indorse this note was vested absolutely in the assignees? I am of opinion that it is not. If the right and title to the note were vested absolutely in them, it would follow as a necessary consequence, that the right and title to every other chattel acquired by an uncertificated bankrupt after his bankruptcy would vest in them absolutely; but the case

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of *Webb v. Fox*<sup>†</sup> is an authority to shew that an uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, against all the world but his assignees, and that he may maintain trover for them against a stranger. It is clear, therefore, that the bankrupt has a property in such goods. The assignees have vested in them a right to interfere and claim the property; and if they do make any claim, it is effectual against the bankrupt and all the world; but if they do not interfere, then, as between the bankrupt, (or one claiming under him,) and his debtor, the latter cannot set up their title; but the bankrupt has a right, in a court of law, to enforce the payment of his debt. In *Kitchen v. Bartsch* the assignees claimed the property. It does not appear that the assignees here have interfered or made any claim, and that being so, I am of opinion, that Clarke had a right to indorse this bill. If the assignees shall ever claim the amount of the note from the defendant, and their claim should even be available, it will be in some measure the fault of the defendant; for he might have made the note payable to the assignees, and not to the bankrupt.

[ 299 ]      BAYLEY, J. :

I am of opinion that the plaintiffs are entitled to retain their verdict on the general issue, and that the verdict on the special plea is not sufficient to deprive them of the judgment in this case. This is an action upon a note payable to Clarke or to the order of Clarke. The defendant, therefore, by making such note, intimates to all persons that he considers Clarke capable of making an order sufficient to transfer the property in the note. The defence now set up is, that although he has issued a security to the world, importing on the face of it that Clarke was capable of making such an order, yet that in fact he was incapable. Now this is a fraud upon the public. It is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to indorse such an instrument, when he asserts by the instrument which he issues to the world, that the other has such power. Thus in *Taylor v. Croker*,<sup>‡</sup> before Lord Ellenborough, a bill was drawn by two infants; the defendants

<sup>†</sup> 4 R. R. 472 (7 T. R. 391).

<sup>‡</sup> 4 Esp. 187.

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accepted, and the two infants indorsed, and it was held that inasmuch as the defendants had, by accepting the bill, admitted that the infants were competent to indorse, they should not be permitted afterwards to say that they were incompetent. So in this case the defendant has affirmed to the world that Clarke was capable of making an order. The facts are, that the bankrupt indorsed to Knight and Freeman, and that they indorsed to the plaintiffs, and that neither the plaintiffs or K. and F. knew that Clarke was a bankrupt. It is settled by many decided cases, that though an uncertificated bankrupt cannot resist the claim of his assignees \*to any property which he has acquired since his bankruptcy, yet that he may acquire property and maintain actions in respect of it, unless the assignees interfere to prevent him. This question was much discussed in *Chippendale v. Tomlinson*. That was an action upon an attorney's bill. The defendant pleaded the bankruptcy of the plaintiff before the bill was incurred, and that plea was held insufficient, on the ground that the rights of the assignees were not to be taken into consideration, unless they themselves interfered. That case has since been followed by *Fowler v. Down*, and other cases. It appears to me that as the defendant, by the form of his note, has stated that he will pay to Clarke's order, he cannot now allege Clarke's inability to make an order as a ground of defence to this action; and, secondly, that the bankrupt may acquire property subsequently to his bankruptcy, and retain that property against all the world, except his assignees.

[ \*300 ]

HOLROYD, J.:

I think that the plaintiffs are entitled to the judgment of the Court upon the whole record, notwithstanding the verdict found for the defendant upon the special plea. The note was made payable to Clarke or his order, and there was an indorsement by Clarke upon the note. All persons, therefore, not cognizant of his bankruptcy, would see upon the face of the note that which would, *primâ facie*, entitle them to take it. Now it may be taken as a general rule, that indorsees of bills of exchange or promissory notes are entitled to recover the sums for which they are respectively made payable, from the persons liable upon the face of the

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bill or note, notwithstanding the rights of third persons, unless the party taking the bill was cognizant of those \*rights when he took it. Thus where a bill of exchange or promissory note, transferable by indorsement, has been lost or stolen, a person deriving his title through another who had no right to indorse, may transfer a right to an innocent indorsee. Here the defendant himself gives Clarke authority to indorse, and he asserts to all those who see the bill that Clarke has that authority, and the assignees have not made any claim. I think, therefore, that the defendant is estopped from setting up their rights. It is not true that the assignment vests absolutely in the assignees all the property acquired by the bankrupt subsequently to his bankruptcy. It would be most injurious to the bankrupt if that were so, for if they were unwilling to sue, and he was unable to sue, the consequence would be that he might lose property so acquired, and the residue of his property would remain liable to his debts. *Ashley v. Kell*<sup>†</sup> is an authority to shew that property, even the subject of trade and sale, so acquired by the bankrupt subsequently to his bankruptcy does not pass absolutely to the assignees, and if that be so, the property acquired by a bankrupt in a negotiable instrument, does not so vest in his assignees.

*Judgment for the plaintiffs.*

<sup>†</sup> 2 Str. 1207.

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Nov. 14.

(2 Barn. &amp; Cress. 302—312; S. C. 3 Dowl. &amp; Ry. 556; 2 L. J. K. B. 28.)

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TRESPASS for breaking and entering the plaintiff's manor. Pleas, first, general issue; second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public navigable river from time immemorial, and that there is in that part of the port which is within the manor, an ancient work necessary for the preservation of the port, and for the safety and convenience of the ships resorting to it; that this work was at the several times when, &c. in decay; that plaintiff would not repair it, but neglected so to do, wherefore defendants entered and repaired. Replication, *de injuria*. Verdict for plaintiff on first plea, and for defendants on the second: Held, that plaintiff was entitled to judgment *non obstante veredicto*, as the second plea did not state that immediate repairs were necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port. Quære, Whether the plea would have been good had it contained those allegations.

TRESPASS for breaking and entering the manor of the plaintiff, called Seaton, and pulling down a quantity of wooden paling and fencing of the plaintiff, and erecting a quantity of wooden paling and fencing, and depositing there a quantity of timber, bricks, stones, and rubbish. The second count was for breaking and entering the *close* of the plaintiff, but in all other respects like the first. Pleas, first not guilty. Secondly, that the close in the second count mentioned, and in which, &c. before and at the said several times when, &c. was, and from thence hitherto hath been, and still is within, and part and parcel of the said manor in the first count mentioned; and that, before and at the said times when, &c. there was, and from thence hitherto hath been, and still is, a certain ancient and public port, haven or harbour, called Workington harbour, partly within the said manor and close; and also in a certain river, to wit, the river Derwent, in a certain part thereof, where the said river now is, and at the said several times when, &c. was, and from time whereof the memory of man is not to the contrary, hath been a public and common navigable river, in which the tides and waters of the sea, for and during all that time, have flowed and reflowed, to wit, at, &c.; and the defendants further say, \*that before and at the said several times when, &c. there was, and hath been within that part of the said

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port, haven or harbour, which is within the said manor and close, a certain ancient work or erection, of and belonging to the said port, haven or harbour, and which was and is requisite and necessary for the support, maintenance, and preservation of the said port, haven or harbour, for the rendering of the same, and the navigation thereof, safe and commodious for the ships and vessels resorting thereto, to wit, at, &c. And the defendants further say, that before any of the said several times when, &c. the said work or erection had been greatly damaged and injured, and was in great decay, and in a bad, ruinous, and dilapidated state and condition, for want of needful and necessary repairing and amending thereof; and that it so remained and continued until, and at the said several times when, &c.; and that before and at the said times when, &c. in the first and second counts mentioned, it was requisite and necessary for the support, maintenance, and preservation of the said port, haven or harbour, and for the keeping and preserving of the same, and the navigation thereof, in a safe and commodious state and condition for the ships and vessels resorting thereto, that the said work or erection should be repaired and amended; but that the plaintiff did not, nor would repair or amend the same or any part thereof, but wholly neglected so to do. Wherefore the defendants, whilst the said work or erection was so in decay, and in a bad, ruinous, and dilapidated state and condition as aforesaid, for the purpose of repairing and amending the said work or erection at the said times when, &c. in the first and second counts mentioned, broke and entered the said \*manor and close, in which &c. and repaired and amended the said work or erection where the same was so in decay, and in a bad, ruinous, and dilapidated state and condition as aforesaid; and because the paling and fencing in the said first and second counts first-mentioned were part of the said erection, and in great decay, defendants pulled them down, and repaired the erection with the paling, fencing, bricks, &c. in the same counts secondly mentioned. The fourth plea stated, that a part of a public navigable river was situate within the manor and close; and that the work or erection in question in that part of the river, was requisite and necessary for rendering the navigation of the river safe and commodious, in other respects it was like

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the second. Replication, *de injuria*, &c. and issue thereon. At the trial before Wood, B., at the Cumberland Summer Assizes, 1822, a verdict was found for the plaintiff on the issue on the first plea, and for the defendant on the issues on the second and fourth, and as to some other issues the jury were discharged from finding any verdict. In Michaelmas Term, 1822, *Scarlett* obtained a rule *nisi* for entering up judgment for the plaintiff on the issues on the second and fourth pleas, *non obstante veredicto*, when the Court directed that it should be argued as a special case; and now it was argued by,

*Parke* for the plaintiff:

It appears upon the pleas under consideration, that the work in question is a private work in a public harbour or river; and judgment must be entered for the plaintiff unless the Court decide, that any person may enter and repair such a work, without giving notice to the person bound to repair, or on whose land it stands, before a reasonable time for \*making the repairs has elapsed, and when the party repairing does not want to use the port or river. For the pleas in question do not aver notice, nor the lapse of a reasonable time, nor occasion to use the port or river. They do not even aver that the plaintiff was bound to repair. There is no statement that any one in particular is bound to repair; surely all the King's subjects are not bound to do it. The plaintiff might have been bound on account of his having dedicated the work to the public: *Hale de Port. Mar.* 78. But there is no allegation of that; and if he be not liable no one else is. But supposing that he is bound, no instance can be shewn where, under such circumstances, any person may repair according to his own judgment. If that were lawful, the obligation might be made doubly burthensome; for, first, it might be necessary to undo the imperfect repairs done by a stranger before proper and substantial repairs could be done. It will no doubt be contended, on the other side, that the pier or erection, in its dilapidated state, was a nuisance, and that the defendant might therefore enter to reform it. But there is a distinction in this respect, between nuisances of commission and those of omission. There are several cases put in 2 Roll. Abr. 144, Nuisance (S),

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and Vin. Abr. Nuis. (S), as to the reformation of a nuisance by the party grieved, or by any individual of the public, and each of those is a case of commission. This distinction is supported by analogy to the writ of assize of nuisance. Now, that does not lie for neglect, but only for commission: 2 Roll. Abr. 141. Nuisance Ass. (H) pl. 9, citing 11 Hen. IV. c. 83, "If a man who ought to scour a ditch does not do it, by means whereof my field is drowned, no assize lies." The object of that writ is to give damages to the party, and to \*remove the nuisance; but the party grieved may enter and abate it: 17 Ed. III. 44, 9 Ed. IV. 35, *Penruddock's* case;† and if he does so, pending the writ, the writ shall abate; Fitz. N. B. 183, note (a), *Baten's* case.‡ It therefore seems, that where a party may have an assize of nuisance, he may, if he chooses, enter and redress the injury himself; but where he cannot have assize, there is nothing to shew that he can enter. Now it has been already shewn, that assize does not lie where the nuisance is merely one of omission; the party is then left to the common-law remedy by indictment. If that be the general rule, the pleas are clearly bad. But at all events they are bad for the want of an averment, that notice of the state of the pier was given to the plaintiff, or that a reasonable time for repairing it had elapsed. Such a work might very possibly sustain a sudden injury by a violent storm; yet, if these pleas are good, any person might enter and repair it the very next day, according to his own idea of what was necessary to be done. This argument *ab inconvenienti* appears conclusive.

*E. H. Alderson, contra:*

There is not any solid distinction between nuisances of commission and those of omission. Pulling down a pier would belong to the former class; but the public sustain an equal injury whether the pier be pulled down or suffered to fall for want of needful repairs. The case may be considered in two ways; either on the supposition that no person is bound to repair, or that some person is. There certainly is not any direct authority to shew that any person is bound by the common law to repair such a work as that in question, although an individual

† 5 Co. Rep. 101.

‡ 9 Co. Rep. 55.

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may be bound by prescription. \*The only dictum to that effect is in Brook Abr. Presentment in Court, pl. 9 ; and there a quære is added, with this observation, " It appears that the opinion is not law." Such a work differs materially in this respect from a high way : the parish are bound by the common law to repair the latter, and may be indicted, unless they can shew that some other person is liable. But whom could you indict for neglecting to repair such a work as this ? If then no person be liable, the work being for the benefit of the public, any one may enter for the purpose of repairing. It is admitted on the other side, that an indictment would lie if such a work were pulled down ; but contended, that the public are without remedy if it be suffered to fall. There are, however, many dicta, that any one may abate or reform a public nuisance, expressed in terms sufficiently general to embrace such a case as this. Lord Hale, De Port. Mar. pt. 2, c. 7, says, " Nuisances of ports are of two kinds. First, such as are immediately only nuisances to the private concernment of the lord of the franchise. Secondly, such nuisances as are common to all men that have occasion to come, go, or stay at ports. I will give instances of some : first, silting or choaking up the port, either by the sinking of vessels in the port, or throwing out of filth or trash into the port whereby it is choaked. Secondly, decays of the wharfs, quays, and piers, which are for the lading of merchandise and safeguard of shipping." Now the latter is clearly a nuisance of omission. After putting some other instances of this second sort of nuisances, Lord Hale, speaking with reference to all that had gone before, says, " Any man may justify the removal of a common nuisance either at land or by water, because every man is concerned in \*it ; " and he makes no distinction between nuisances of commission and omission. There are many cases in which any one may justify interfering with the property of another to prevent an injury to the public. Thus, if a house in a street were likely to fall, it might be pulled down ; or, if a bank of the sea were likely to break, and a *festinum remedium* were necessary, any one might apply it. So, according to *Mouse's* case,† a house may be pulled down to prevent the spreading of a fire ; which is a strong

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† 12 Co. Rep. 63.



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case, for there an injury is done to the individual for the public good. In Bro. Abr. Nuis. 28, it is said that a man is not bound to cut his trees which overhang the road, and therefore another may do it. If, then, no person is bound to repair the work in question, the defendant was justified in doing it. In *Rex v. Wilcox*,† it appeared that the defendant being indicted for a nuisance, was convicted and fined; and it was moved, that by the general pardon the defendant was excused both as to the fine and the abatement of the nuisance. But the Court held, that he should be discharged only as to the fine, and not as to the abatement; for that was not a punishment of the party, but a removal of that which was a grievance to other people, and any person may abate a public nuisance. That case shews that the public have two rights in cases of nuisance; one to punish the offender, and the other to vindicate themselves. Secondly, omission in the party is commission against the public; and, therefore, if the plaintiff was bound to repair, his neglect made him a tort-feasor, and he cannot maintain an action for that which arose out of his own wrongful act.

[ 309 ] (BAYLEY, J. : The plea does not state how long the work had been ruinous, or that the plaintiff knew it was so, or that a reasonable time for repairing had elapsed, or that immediate repairs were necessary.)

If the negative of any of those circumstances could have been proved for the plaintiff, they should have been replied; but as that was not done, it must, after verdict, be presumed that every thing necessary to justify the verdict was proved by the defendant.

*Parke* in reply :

It is not necessary to dispute the authorities cited on the other side, for they merely support a principle which does not arise on this record, viz. that any person may justify the removal of that by which his Majesty's subjects are placed in immediate danger. There is nothing to shew that any such danger existed in this case. The question then rests

† 2 Salk. 458.

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upon the general authority to repair without notice, and before the lapse of a reasonable time, and without occasion, in the party repairing, to use the port. But it is said that the plaintiff is not bound to repair. The pleas seem to have been framed upon an opinion that he was so bound, for it is alleged that he did not nor would repair, but neglected so to do. But supposing him not bound, there is not any authority to shew that any person may repair. There might possibly be a dedication of the work to the public for so long as it would last; and then an indictment for removing it might be maintained, but not for suffering it to decay. As for the passage in Lord Hale, *De Port. Mar.*, where he is supposed to say that any one may abate a nuisance, with reference to those of omission as well as commission, it is somewhat singular that the example \*which he adds is a nuisance of commission. “The burgesses of Southampton justified the throwing down of a wear belonging to the Abbot of Tichford, in a creek of the sea, *quia levata fuit ad nocumentum domini regis et villæ Southampton et quod batelli et naves impediuntur quominus venire possunt ad portum villæ.*” And he adds, “But because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary courts of justice.”

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ABBOTT, Ch. J. :

I am of opinion that the plaintiff is entitled to judgment *non obstante veredicto*, on the second and fourth pleas. This was an action of trespass; the first count charged a breaking and entering of the plaintiff's manor, and the second count a breaking and entering of the plaintiff's close. The only difference between them is the substitution in the latter of the word “close” for “manor” in the former. On the general issue a verdict was found for the plaintiff. It was therefore established that he was entitled to the manor and close, and in possession of both; and the only question is, whether the special pleas are a good justification of that which was done. Now it is incumbent on him who enters upon the land of another to shew that he has a right so to do. The substance of the pleas is, that there is an ancient and immemorial harbour

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and navigable river, partly situate within the manor and close ; and that in that part which is within the manor and close, there is an ancient work or erection, (not that there has been such a work from time immemorial) requisite and necessary for the maintenance of the port, and for rendering the same, and the navigation of the river, safe and commodious for the ships resorting thereto. There \*is a further allegation, that this work was in a state of decay, and that the plaintiff did not nor would repair it, but neglected so to do ; wherefore the defendants entered and repaired. The defendants have not alleged that immediate repairs were necessary, nor that any person bound to repair had neglected to do so after notice, nor that a reasonable time for making the repairs had elapsed. They have not even alleged that they had occasion to use the port or river ; and for any thing that appears on these pleadings, they may have been mere volunteers, not at all interested in the preservation of the work in question, nor prejudiced by the want of those repairs which they thought fit to do. Upon these grounds I am of opinion that judgment must be entered for the plaintiff, on the issues on the second and fourth pleas.

BAYLEY and HOLROYD, JJ. concurred.

BEST, J. :

Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them ; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them.† The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property

† This *dictum* is cited and applied by Lord HERSCHELL (Lord Chancellor) in *Lemmon v. Webb* (H. L. 27 Nov. 1894) '95, A. C. 1, 64

L. J. Ch. 205, 206, where the right to cut down overhanging branches came directly into question.—R. C.

may sometimes require so speedy a remedy as not to allow time to call \*on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice. It is not stated in this plea that this building had been out of repair for any time. An accident the day before it was repaired might have reduced it to the state in which it was found by these defendants. Neither does it appear that this building was immediately wanted, either for the safety or convenience of such as resorted to the port, or that these defendants ever had or were ever likely to have occasion to use it, or had any more right to interfere with the repairs of it than all the other subjects of the realm. If no person in particular be bound to repair, those who wish to do any repairs ought to give him on whose land they have occasion to enter for that purpose some notice of their intention, that he may decide whether he will not rather do what is necessary himself, than suffer the intrusion of strangers upon his estate. I am, therefore, of opinion that these pleas cannot be supported.

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*Judgment for the plaintiff.*

### JONES AND HIRST v. SIMPSON AND OTHERS.†

(2 Barn. & Cress. 318—324; S. C. 3 Dowl. & Ry. 545; 2 L. J. K. B. 22.)

A. having consigned goods to B., sent him the following order: "Pay to A. B. the proceeds of a shipment of goods, value about 2,000*l.*, consigned by me to you." B., by writing, consented to pay over the full amount of the net proceeds of the goods: Held, that neither of these instruments required such a stamp as the Stamp Acts imposed on bills, drafts, or orders for the payment of money.

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[ 318 ]

THIS was a case sent by the VICE-CHANCELLOR for the opinion of this Court.

In the year 1811, W. Blackburn carried on the business of a merchant, at Saddleworth, in Yorkshire, and the defendant, Simpson, carried on the business of a \*merchant, in partnership

[ \*319 ]

† See now Bills of Exchange Act, 1882, s. 3, and Stamp Act, 1891, s. 32 and Schedule 1.—R. C.

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with the defendant Wilson, of Quebec, in Canada, such business being carried on in London in the name of Simpson alone, and at Quebec, under the firm of G. Wilson & Co. In the year 1811 W. Blackburn delivered to Simpson twelve bales of woollen cloth, invoiced at 1,640*l.* 17*s.* 10*d.*, to be shipped and consigned to the firm of G. Wilson & Co. at Quebec, to be sold there on the account and at the risk of Blackburn. They were duly shipped by Simpson, and consigned to and received by the firm of G. Wilson & Co. at Quebec, by whom the same were sold, and the proceeds, or some parts thereof, were afterwards remitted to Simpson. On the 7th of August, Blackburn wrote and sent to Simpson the following order: "Mr. R. Simpson, please to pay to Nelson, on account of the assignees of Oakley, Overend, and Oakley, the proceeds of a shipment of twelve bales of goods, value about 2,000*l.*, consigned by me to you." On the 21st of the same month, Simpson wrote and sent to the defendant Nelson, as one of the assignees of Oakley, Overend, and Oakley the following undertaking: "Shipped on board the *Sarah*, from London to Quebec, for the account of W. Blackburn, twelve bales of woollen cloth, value, as per invoice, 1,640*l.* 17*s.* 10*d.*; there to be sold, and the proceeds to be paid by his order, dated the 7th instant, to the assignees of Oakley, Overend, and Oakley. In pursuance of the said order of Blackburn, I do hereby consent and engage to pay over the full amount of the net proceeds of the said twelve bales of woollen cloths, as I may from time to time receive the same, unto the said assignees without delay." On the 15th July, 1812, a commission of bankrupt issued against the said W. Blackburn, under which the plaintiffs, Jones and \*Hirst, were chosen assignees. Pursuant to an order made in this cause, bearing date the 23rd day of July, 1818, Simpson paid into the Bank of England, in the name of the Accountant-General, in trust in this cause, the sum of 409*l.* 5*s.* 7*d.*, in respect of the proceeds of the said bales of woollen cloths. Simpson has since become bankrupt, and the defendants W. Fulford and T. Bradley are the assignees under the commission against him. The question for the opinion of this Court was, whether the above two instruments, or either, and which of them, require such a stamp as the Stamp Acts impose upon bills, drafts, or orders for payment of money.

[ \*320 ]

*Littledale* for the plaintiffs :

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The 48 Geo. III. c. 149, was the Stamp Act in force at the time when these instruments were signed. Now in schedule, part 1, title Bill of Exchange, certain duties are first imposed upon bills, with reference to the sums for which they are made payable ; and then upon any bill, draft, or order for the payment of any sum of money, weekly, monthly, or at any other stated period, where the total amount of the money shall be specified therein, or can be ascertained therefrom, the same duty is imposed as upon a bill for a sum equal to the total amount.

(ABBOTT, Ch. J. : No sum is specified in this instance, nor can it be ascertained from the instrument ; that clause is therefore wholly immaterial.)

It shews that the sum to be paid may be ascertained in different ways ; and if in any way a sum certain appears to be due, that is the sum to regulate the duty. The next clause provides for the case where the total amount of the money thereby mentioned to be payable shall be indefinite, and then the same duty attaches as \*on a bill for the sum expressed only.

[ \*321 ]

(ABBOTT, Ch. J. : Here no specific sum was expressed. Suppose the order be to pay all the money due, what is the duty to be imposed ?)

The schedule then proceeds to declare, that several instruments shall be deemed bills, drafts, or orders for the payment of money, and one of them is a draft or order for the payment of a sum of money out of a particular fund, which may or may not be available. Now here the order is for the payment of the proceeds of a shipment, value about 2,000*l.*, or in other words, for the payment of a sum of money out of a fund which may or may not be available, and when the amount of those proceeds was ascertained, a stamp appropriate to a bill for that amount ought to have been affixed to the instrument. A similar clause in the Stamp Act, 55 Geo. III. c. 184, was considered to apply to

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an instrument of this description, in *Firbank v. Bell*,† and *Butts v. Swann*.‡ There indeed the sums payable were specified upon the face of the instrument.

(BAYLEY, J.: The Act imposes duties upon bills of exchange and promissory notes, which were well known instruments. There were other instruments, however, nearly in the same form, but which did not come within the description of bills of exchange or promissory notes, because the money was payable out of a particular fund, or upon a contingency, and the Legislature probably had those instruments in contemplation in the clause which has been referred to. This instrument, however, would not be a bill of exchange if the proceeds were not payable out of a particular fund, because the order was not for a specific amount.)

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*Marryat* was to have argued on the other side, but the Court said the case was too clear to admit of any doubt.

The following Certificate was afterwards sent :

“ This case has been argued before us, and we are of opinion that neither of the two instruments required such a stamp as the Stamp Acts impose on bills, drafts, or orders for the payment of money.

“ C. ABBOTT.

“ J. BAYLEY.

“ G. S. HOLROYD.

“ W. D. BEST.”

† 1 B. & Ald. 36.

‡ 2 Brod. & Bing. 78 ; 4 Moore, 484.

THE KING *v.* PINNEY AND ANOTHER.

(2 Barn. &amp; Cress. 322—324; S. C. 3 Dowl. &amp; Ry. 578.)

1823.  
Nov. 19.

[ 322 ]

A local Act directed that the then overseers of the parish of W. should continue to be overseers for the remainder of the current year, and until two others should be appointed, and that two overseers should be appointed annually: Held, that this Act did not repeal the statute 43 Eliz. c. 2, s. 1, and that an appointment of four overseers for the parish of W. was valid.

By statute 47 Geo. III. sess. 2, c. 111, s. 92 (local and personal Act) it was enacted that the then overseers of the parish of Woolwich should continue to be overseers for the remainder of the year 1807, and until two other overseers should be nominated and appointed, in the manner and at the time by law directed, to succeed them; and in Easter week, or within one month of Easter, in every year, two persons being substantial householders in the said parish should be nominated and appointed, in the manner by law directed, to be overseers of the poor of the said parish. By an order of two justices, made on the 25th March, 1823, four persons therein named were appointed overseers of the poor of the parish of Woolwich, and upon appeal the \*Sessions confirmed that order. A rule *nisi* having been obtained for quashing the order of Sessions

[ \*323 ]

*Bolland* and *Andrews* now shewed cause, and contended that although the local Act compelled the justices to appoint two overseers, it did not restrain them from appointing more than two. In *Rex v. Loxdale*† it was held, that under the statute of Elizabeth more than four could not be appointed, but there the number fixed being four, three, or two, clearly shewed that it was the intent of the Legislature to prevent the appointment of a greater number; now here, before the local Act, more than two might have been appointed, and there are no express words in that Act denoting the intention of the Legislature to make any alteration in that power. The Act only requires that two, at all events, shall be appointed.

† 1 Burr. 445.



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*Scarlett and Adolphus, contra*, contended that as the local Act expressly directed that two should be appointed, it must be taken that the Legislature intended that the overseers should not exceed that number.

ABBOTT, Ch. J.:

[ \*324 ]

It is a general rule of construction that affirmative words in a later statute do not repeal a former, unless there be something wholly inconsistent in the provisions of the two statutes. Lord C. B. Comyns, in his Digest, tit. Parliament, R. 25, lays it down that such affirmative words do not take away a former statute, unless they in sense contain a negative. Now the statute of Elizabeth directs that the overseers for parishes shall be four, three, or two substantial \*householders. The local Act merely directs that the then overseers should continue in office to the end of the year, and until two others should be appointed, and that two others should be annually appointed. These words do not, in sense, contain a negative, nor is there any inconsistency between a provision authorising the appointment of four, three, or two overseers, and another directing the appointment of two. The latter statute requires absolutely that two shall be appointed, but it does not say that more than two shall not be appointed. That being so, I am of opinion that the provision of the statute of Elizabeth as to the appointment of overseers, is not repealed by the local Act, and that the order of justices was right.

*Rule discharged.*

1823.  
Nov. 27.

[ 345 ]

### RHODES v. HAIGH AND ANOTHER.†

(2 Barn. & Cress. 345—347; S. C. 3 Dowl. & Ry. 608; 2 L. J. K. B. 40.)

Upon the trial of an action on the case relating to the right of using a stream of water, a verdict was taken for the plaintiff, subject to the award of an arbitrator, to whom all matters in difference were referred, with liberty to the arbitrator to regulate future enjoyment of the stream. One of the parties to the cause having died before any award was made, it was held that his death determined the arbitrator's authority, and an award made subsequently was set aside.

THIS was an action brought to try the right to a watercourse, and the mode of using a stream of water. By an order of Nisi

† See note to *Cooper v. Johnson*, 20 R. R. 483.—R. C.

Prius made at the Summer Assizes, 1822, for the county of York, a verdict was taken for the plaintiff for 500*l.* damages and 40*s.* costs, subject to the award of J. W., to whom all matters in difference between the parties were thereby referred, with power to order a nonsuit or a verdict for the defendant, and to regulate the future enjoyment, according to the rights of the parties. The plaintiff in the cause died on the 15th December, 1822, and the award was not made until the 5th day of February, 1823, a rule *nisi* for setting aside the award having been obtained, on the ground that \*the death of the party before the award was a revocation of the submission: *Toussaint v. Hartop*,† *Cooper v. Johnson*.‡

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[ \*346 ]

*F. Pollock* now shewed cause :

The death of one of the parties before the award was made was not a revocation of the arbitrator's authority, because here a verdict was taken at the trial for a certain sum, subject to the award of an arbitrator, and the sum afterwards awarded is to be taken as if it had been originally found by the jury. The plaintiff is then entitled to enter up judgment for the amount, without first applying to the court for leave to do so. The award is substituted for the verdict of the jury, and gives the party the benefit of the statute 17 Car. II. c. 8, § by which it is enacted, " that the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict." Here the judgment would have been entered in Hilary Term, 1823, if the plaintiff had not obtained the present rule. Here, indeed, something besides the cause was referred, but the award, notwithstanding, will be good as far as it determines the cause.

(BAYLEY, J. : || The death of any of the parties is in general a revocation of an arbitrator's power ; but where the submission is by order of *Nisi Prius*, and a verdict is taken which the arbitrator is to alter as he thinks fit ; if nothing is submitted

† 7 Taunt. 571, 1 Moore, 287.

‡ 20 R. R. 483 (2 B. & Ald. 394).

§ See 46 and 47 Vict. c. 49, ss. 4, 7.

| The learned Judge read from a manuscript the whole of the matter contained between the brackets.

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which the verdict and the judgment thereon will not embrace, the death will be no revocation. If any thing is submitted which the verdict and judgment will not embrace, it will be a revocation of the whole, because as to that which the verdict and judgment \*will not embrace, the arbitrator cannot proceed ; and if he cannot proceed upon all the matters submitted, he cannot proceed upon any. That was decided in *Bower v. Taylor*, Easter Term, 1816. Verdicts were taken in a replevin cause and in an action of assumpsit, subject to a reference, the cost of the causes to abide the event, and the cost of the reference to be in the arbitrator's discretion. Taylor died before the award made, but the arbitrator proceeded and ordered the verdict to be entered for the defendants in both causes, and plaintiff to pay the costs of the reference. A rule *nisi* was obtained to set aside the award, and it was urged, that the plaintiff might have wished to examine Taylor. ABBOTT, J. observed, that upon affidavits that he so intended, it might have furnished a special ground for vacating the award ; but the master having stated that the cost of the reference would be included in the judgment, the court held that the death did not prevent the arbitrator's proceeding. Rule discharged. HOLROYD, J. thought no submission by order of *Nisi Prius* revocable.)

ABBOTT, Ch. J. :

This case falls within the principle laid down in *Bower v. Taylor* ; for here all matters in difference are referred, and the arbitrator has a power to regulate the future enjoyment of the stream. The verdict and judgment would not embrace either of those matters. Since the decision of that case, it was held by this Court, in *Cooper v. Johnson*, where the cause only had been referred, that the death of either party determined the arbitrator's authority. I am, therefore, clearly of opinion, that the rule for setting aside the award must be made absolute.

*Rule absolute.*

*Littledale* and *Alderson* were to have argued in support of the rule.

HIGGINS *v.* SARGENT, ESQ., AND OTHERS.†

(2 Barn. &amp; Cress. 348—353; S. C. 3 Dowl. &amp; Ry. 613; 2 L. J. K. B. 33.)

1823.  
Nov. 28.

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In covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A.

COVENANT upon a policy of assurance, bearing date the 10th March, 1819, by which the defendants covenanted to pay to the plaintiff 4,000*l.* at the expiration of six months after due proof of the death of R. C. Burton. The cause was tried before Bayley, J., at the last Assizes, for the county of York; and the principal question was, whether R. C. Burton's life was an insurable life at the time when the policy was effected. The learned Judge summed up the evidence to the jury with reference to that question, no point having been then made as to interest; but when the jury returned a general verdict for the plaintiff, his counsel then claimed to have interest allowed upon the principal sum insured, from the time when that sum became due. It was now stated in the affidavits that R. C. Burton died in April, 1821, and that due proof of his death was given to the defendants, so that the principal sum insured became due on the 6th November, 1822, and that the interest upon that sum to the first day of Michaelmas Term, 1823, amounted to 200*l.* A rule *nisi* having been obtained for increasing the damages to 1,200*l.*,

*J. Williams, F. Pollock and Holt* now shewed cause :

The plaintiffs can only recover interest by way of damages for detention of the debt; it was not claimed until the jury had returned their verdict, and it was a question for them. It is clear that a party is not entitled \*to recover interest in all cases, from the time when a specific sum becomes payable: *Gordon v. Swan*.† There, copper was sold at so much per ton, payable

[ \*349 ]

† Cited and followed in judgment of V.-C. HALL in *Hill v. South Staffordshire Ry. Co.* (1874) L. R. 18 Eq. 154, 168; 43 L. J. Ch. 556, 560. A different rule has been followed in Admiralty cases of collision, where

the amount of liability is limited by law: *The Northumbria* (1869) L. R. 3 A. & E. 6, 39 L. J. Adm. 3.—R. C. † 12 East, 419 (and see 11 R. R. 758, *n.*).

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at six months; and after argument, the Court held, that the vendor was not entitled to interest from the expiration of the credit.

*Scarlett and D. F. Jones, contra :*

In *Blaney v. Hendricks*† it was held, that interest is due on all liquidated sums from the time when the principal becomes due and payable.

(ABBOTT, Ch. J. : That case has been long over-ruled.)

The money in this case became due upon a specialty, and therefore ought to carry interest. It is true that interest is not due for rent in arrear, because the landlord has in his power the means of recovering his rent, viz. by distress and sale. But interest is due upon a specialty debt, and also upon bills of exchange and promissory notes which are not specialties. If goods be sold to be paid for at the end of a month by a bill having two months to run, and a bill is not given, interest is due from the time of the expiration of the credit. And if so, why should not interest be payable if the contract were to pay the money at the same time as it would have been payable if a bill had been given.

ABBOTT, Ch. J. :

It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. It is of importance that this rule should

[ \*350 ] \*be adhered to; and if we were to hold that interest was payable in this case, the application of the general rule might be brought into discussion in many others. Interest was not claimed by the plaintiff's counsel in this case until the Judge had concluded his address to the jury upon the principal question for their consideration, and they had pronounced their verdict upon that question in favour of the plaintiff. It was then contended for the first time, that the plaintiff was entitled to have interest

† 2 Bl. Rep. 761.

allowed him upon the principal sum, secured by the policy, from the time when it had become payable; and that point was reserved by the learned Judge. The only question upon the present rule is, whether the jury ought to have been told that they were bound by law to give the plaintiff interest from that time; for if it was a matter for their discretion only, and it was not properly submitted to them, that may be a ground for granting a new trial, but not for increasing the damages. Inasmuch as the money recovered in this cause was not due by virtue of a mercantile instrument, and as there was no contract express or implied on the part of the defendant to pay interest, I cannot say that the jury ought to have been told that they were bound to give interest. That being so, this rule for increasing the damages must be discharged.

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BAYLEY, J. :

I am of the same opinion. It was once the opinion, that money lent carried interest, and in *Calton v. Bragg*† it was so contended, on the ground that the lender would otherwise, for the accommodation of the borrower, lose the benefit which he might make \*of his capital; and that the lender ought, in equity, to be put in the same situation as if he had applied his principal to his own use. But this Court held, that interest was not due by law for money lent without a contract for it expressed, or to be implied from the usage of trade or from special circumstances. Now, if interest be not due for money lent which is to be repaid either upon demand or at a given time, it follows, that it is not due for money payable within a certain time after due proof of the happening of a particular event. The circumstance of the money having become due in this case by virtue of a contract under seal, does not make any difference. If it were the intention of the parties that the principal sum should bear interest from the time when it became due, that might have been expressly provided for in the deed, but not having been done, the law will not imply a contract on the part of the defendants to pay interest; and, consequently, the jury ought not to have been directed to give interest.

[ \*351 ]

† 13 R. R. 451 (15 East, 223).

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I think that the Judge would not have been warranted in directing the jury to give interest in this case. It is clearly established by the later authorities, that unless interest be payable by the consent of the parties express, or implied from the usage of trade (as in the case of bills of exchange) or other circumstances, it is not due by common law. In *De Havilland v. Bowerbank*,† Lord ELLENBOROUGH was of opinion, that where money of the plaintiff had come to the hands of the defendant, to establish a right to interest upon it, there should either be a specific agreement to that effect, \*or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used; and in *Gordon v. Swann*,‡ the same noble and learned Judge said, that the giving of interest should be limited to bills of exchange, and such like instruments and agreements reserving interest. In the latter case, although the money was payable at a particular day, non-payment at that day was held not to give any right to interest. Independently of these authorities, I am of opinion upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now, in that action the defendant was summoned to render the debt, or shew cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action. If this, therefore, had been an action of debt, the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages resulting from the non-payment of the debt. Where, indeed, the interest becomes payable by virtue of a contract express or implied, then it becomes part of the debt itself, and consequently it would then be no answer to an action of debt for the defendant to shew that he had paid the principal sum advanced. Here, there being no contract either express or implied to pay interest, it was no part of the debt, but could only be recovered by way of damages for

† 1 Camp. 50.

‡ 12 East, 419.

detaining the debt. Inasmuch, therefore, as it appears, that if the plaintiff had pursued that remedy which \*by the common law is specifically applicable to his case, he could not have recovered interest, I think that he ought not to be permitted to recover interest by way of damages in an action of covenant. I cannot therefore say that the jury ought to have given interest in this case, and I doubt much whether the verdict could have been supported if they had done so.

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*Rule discharged.*



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ELIZABETH MURTHWAITE, AND OTHERS, *v.* THE  
HONOURABLE CHARLES CECIL POPE JENKIN-  
SON, AND OTHERS.

(2 Barn. & Cress. 357—388 ; 3 Barn. & Cress. 191 ; S. C. 3 Dowl. & Ry. 764.)

A devise to trustees for purposes which may require them to deal with the fee-simple of the estate, vests the legal estate in them accordingly, notwithstanding subsequent words of direct gift to the beneficiaries.

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A., by will duly executed to pass real estates, devised and bequeathed to trustees, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every his freehold, copyhold, and leasehold estates, and all his personal estate and effects whatsoever and wheresoever, in trust to pay thereout the several legacies and annuities therein by him given and bequeathed, and for other purposes in the will mentioned. The testator then gave legacies and annuities to a considerable amount; and proceeded, "All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seised or possessed of, interested in, or entitled to, at the time of my decease, I do give, devise, and bequeath unto my three nieces, E. M., M. M., and C. M., equally to be divided between them, share and share alike, for and during the term of their natural lives. And from and after the decease of them or either of them, it is my will that the lawful issue of them and each of them shall have and enjoy his or her mother's share of all such residue of such rents, issues, dividends, and profits for life in like manner. And if either of my nieces shall happen to die in the lifetime of the others or other of them without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid, shall go to, and be shared and divided equally between, the survivors of my nieces for their respective lives, and afterwards by the lawful issue of the survivors of my nieces in like manner. And if all my nieces and their issue, save one, shall die without issue lawfully begotten, then such surviving niece shall have and enjoy the whole of the rents, &c. of such residue of my estate and effects for and during the term of her natural life. And from and after her decease, the lawful issue of such surviving niece (if more than one) shall have the whole of the rents, &c. equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part thereof as is personal, to and for his or her own use and benefit; and to hold so much and such part or parts thereof as are freehold, to them and each of them, if more than one, their or his or her heirs and assigns, as tenants in common, and not as joint tenants; and if but one, then to such one, his or her heirs and assigns for ever. And if all my nieces shall die without issue, then from and after the decease of the survivor of them my nieces without issue as aforesaid, I give the whole of such residue to my next male heir of the name of Murthwaite, to hold to him, his heirs, executors, and administrators, in manner aforesaid." Two of

the trustees were dead. All the nieces were still living, two of them had no children, the other had one child, a son, G. B. There was a large surplus of the estate, but it was not stated in the case that the debts, legacies and annuities had been paid or satisfied.

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Held, by the Court of K. B., that the surviving trustee took a legal estate in fee-simple in the freehold estates, and an absolute legal interest in the leasehold: and, in effect, that the three nieces took beneficially estates tail in the freehold, and absolute interests in the leasehold.

The Lord CHANCELLOR agreed with the K. B. as to the freeholds; but, as to the leaseholds, held that the limitation over of the beneficial interest was good.

THIS case was sent by the LORD CHANCELLOR for the opinion of this Court. Thomas Murthwaite, late of Smallberry Green, within the parish of Isleworth, in \*the county of Middlesex, Esq., the testator hereinafter named, was, at the times of making his will and of his death, seised in fee-simple of freehold tenements, and seised in fee-simple of some copyhold tenements, which he duly surrendered to the use of his will; and was also possessed of several leasehold estates for years, and of other personal estate of different descriptions to a very considerable amount. And the said Thomas Murthwaite duly made and executed his last will and testament, in writing, bearing date the 29th of December, 1806, and which was duly executed and attested, so as to pass freehold estates, and was as follows: "I give, devise, and bequeath to Mrs. Margaret Murthwaite, of Twickenham, in the county of Middlesex, widow, Mr. John Cuthbertson, of Poland Street, in the said county of Middlesex, and to Mr. John Janes, of the Inner Temple, London, gentleman, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, all and every my freehold, copyhold, and leasehold estate, and my personal estate and effects whatsoever, and wheresoever situate, lying, and being, whether the same consists of mortgage, money in the public funds or stocks, bonds, notes of hand, or other securities, and all other my real and personal estate and effects of what nature or kind soever, not hereinafter by me specifically bequeathed, upon the trusts, and to and for the uses, ends, intents, and purposes hereinafter expressed, mentioned, and declared of and concerning the same; that is to say, in trust to pay thereout the several \* legacies and annuities herein by me given and bequeathed, and

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[ \*360 ]

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for other the purposes in this my will mentioned." The testator then gave annuities to several persons for their respective lives, to the amount of 440*l.* per annum; and proceeded: "All which beforementioned annuities I hereby will, order, and direct, shall be chargeable upon and payable out of my twenty-six thousand and four hundred pounds three per cent. Consolidated Bank Annuities, or such sum as may be standing in that fund in my name at the time of my decease." The will then contained bequests of legacies to a considerable amount, and then was as follows: "All the rents, issues, dividends, interest, profits, and produce of all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever, as well real as personal, which I shall die seised or possessed of, interested in, or in any way entitled unto at the time of my decease, I do hereby give, devise, and bequeath unto my three nieces, Elizabeth Murthwaite, Maria Murthwaite, and Charlotte Murthwaite, daughters of my late brother, the Reverend Peter Murthwaite, late of Ipsden, in Oxfordshire, equally to be divided between them, share and share alike, for and during the term of their respective natural lives; subject, nevertheless, to such provision as is hereinafter provided touching and concerning the house and premises now in my occupation. And from and after the decease of them, or either of them, it is my will and meaning, that the lawful issue of them and each of them shall have and enjoy his or her mother's share of all such residue of such rents, issues, dividends, and profits, for life, in like manner; and it is my further will and meaning, \* that if either of my said nieces shall happen to die in the lifetime of the others or other of them, without issue of her body lawfully begotten, that the share of her so dying without issue as aforesaid, shall go to and be shared and divided equally between the survivors of my said nieces for their respective lives, and afterwards by the lawful issue of the survivors of my said nieces in like manner. And if all my said nieces and their issue, save one, shall die without issue lawfully begotten, then it is my will and meaning, that such surviving niece shall have and enjoy the whole of the rents, issues, dividends, interest, and profits of such residue and remainder of my estate and effects for and during the term of

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her natural life; and from and after her decease, it is my further will and meaning, and I do hereby will, order, and direct, that the lawful issue of such surviving niece, (if more than one,) shall have and enjoy the whole of the rents, issues, dividends, interest, and profits of all such residue of my estate and effects, equally between them, share and share alike; and if but one, then such only one shall have and enjoy the whole of such part thereof as is personal, to and for his or her own use and benefit; and to hold so much and such part and parts thereof as are freehold to them and each of them, if more than one, their or his or her heirs and assigns, as tenants in common, and not as joint tenants; and if but one, then to such only one, his or her heirs and assigns for ever; and to hold so much and such parts thereof as is and are copyhold, at the will of the lord or lords, lady or ladies of the manor or manors of which the same are holden in like manner. And if all my said nieces shall die without issue, then from and \* after the decease of the survivor of them my said nieces without issue as aforesaid, I do hereby give, devise, and bequeath the whole of such residue and remainder of my estate and effects, as well real as personal, and as well freehold as copyhold, to my next male heir of the name of Murthwaite; to hold to such male heir, his heirs, executors, and administrators in manner aforesaid." The testator then, after reciting that his house was leasehold, and that the said Margaret Murthwaite and his three nieces might not choose to live together, or to occupy his house, devised the same to them or such of them as should be living at his decease; but if it should happen that they did not agree to live together, he directed that the house and furniture should be sold, and disposed of by the trustees therein-before named, or the survivors; and that the money to arise by such sale should be divided equally amongst the said Margaret Murthwaite and his said three nieces, or such of them as should be living at the time of his decease, and the lawful issue of them as should be dead, if any, for their use and benefit. Then followed clauses appointing executors, and relating to other matters not important to this case.

The testator died on the 23rd day of November, 1808, without having revoked or altered the said will, and leaving his said

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three nieces, the plaintiff Elizabeth Murthwaite, the defendant Maria Barnard, then Maria Murthwaite, and the plaintiff Charlotte Macpherson, then Charlotte Murthwaite, and the said Margaret Murthwaite, John Cuthbertson, and John Janes, him surviving. And the said testator left his said three nieces his heirs-at-law, and likewise his customary heirs. Margaret Murthwaite, John Cuthbertson, and \*John Janes proved the said will of the said testator. Maria Barnard, then Maria Murthwaite, some time in the year 1809 intermarried with George Barnard, but who departed this life on the 5th day of October, 1817, leaving Maria, his wife, surviving; and there was issue of the said marriage between them only one child, viz.: George Barnard. John Janes, one of the executors and trustees of the said testator, died in the year 1814, leaving Margaret Murthwaite and John Cuthbertson, his co-trustees and co-executors, him surviving; and the said Margaret Murthwaite died some time in the year 1816, intestate, leaving the said John Cuthbertson, and also her said daughters, Elizabeth Murthwaite, Maria Barnard, and Charlotte Macpherson surviving her. A very large surplus of the testator's personal estate and effects remains after paying his funeral and testamentary expenses, and his debts, and the legacies and annuities bequeathed by him. The defendant, George Irton Murthwaite, would now be the next male heir of the said testator, of the name of Murthwaite, in case the said Elizabeth Murthwaite, Charlotte Macpherson, and Maria Barnard were now dead without leaving issue. The questions for the consideration of the Court are,

First, what estate and interest the said John Cuthbertson, the surviving trustee, now has under the said will of the said testator, in the freehold and leasehold tenements respectively devised and bequeathed unto the said Margaret Murthwaite, John Cuthbertson, and John Janes, as aforesaid.

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Secondly, what estates the said testator's said three nieces, Elizabeth Murthwaite, Maria Barnard, and Charlotte \*Macpherson, respectively took under the said will of the said testator, in the said freehold and leasehold tenements respectively.

Thirdly, whether the said George Barnard now has any and what estate in the said freehold and leasehold tenements respec-

tively, and what estate he will have in the said freehold and leasehold tenements respectively, in case he shall be the only issue of the said three nieces living at the death of the survivor of them, no other issue having been born; and in case the said George Barnard should now die, in the lifetime of the said three nieces of the said testator, what estate would he die seised and possessed of in the said freehold and leasehold tenements respectively.

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And in case the Court shall be of opinion, that by the will, as above stated, the whole legal estate in fee-simple, in the said freehold tenements, and the absolute interest in the said leasehold tenements, is now vested in John Cuthbertson; then, in case the will had commenced with these words, "all the rents, &c.," and the passage before these words had been omitted,

Fourthly, what estate the said testator's three nieces, Elizabeth Murthwaite, Maria Barnard, and Charlotte Macpherson, would respectively have taken under the said will of the testator, in the said freehold and leasehold tenements respectively; and,

Fifthly, whether the said George Barnard would now have any and what estate in the said freehold and leasehold tenements respectively, and what estate he would have in the said freehold and leasehold tenements respectively, in case he shall be the only issue of the said three nieces living at the death of the survivor of them, \*no other issue having been born; and in case the said George Barnard should now die, in the lifetime of the said three nieces of the said testator, what estate would he die seised and possessed of in the said freehold and leasehold tenements respectively.

[ \*365 ]

This case was argued in the course of the last Term, by

*Tindal*, for Elizabeth Murthwaite, John Macpherson, and Charlotte his wife :

To the first question proposed, the Court must answer, that John Cuthbertson, the surviving trustee, hath not now any estate under the will of the testator; to the second, that the three nieces took legal estates in tail, with cross-remainders in tail, in the freehold, and absolute estates in the leasehold; to the third, that George Barnard has not now any estate in the said freehold

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and leasehold tenements, or either of them ; but, if he survives his mother and aunts, they having had no other issue, or leaving no other issue, he will take an estate tail in the whole freehold by descent from his mother. If this view of the case be correct, the other questions do not arise. \* \* \*

[ 374 ]           *Campbell*, for Maria Barnard, confined himself to the question, what estate was taken by the nieces in the freehold tenements, and he contended that they took an estate tail. \* \* \*

[ 378 ]           *Littledale*, for G. Barnard :

The surviving trustee now has an estate in fee-simple in the freehold, and an absolute estate in the leasehold tenements. If that be not so, then the nieces have estates for life, with remainder to their issue, as purchasers in tail as tenants in common, and G. Barnard has a vested remainder in tail in one-third, liable to be divested or opened upon the birth of other children of his mother, with a contingent remainder in tail in the shares of his aunts ; and if he should be the only issue of the nieces living at the death of the survivor, he will have an estate tail in the whole of the freehold, and an absolute estate in the leasehold. \* \* \*

[ 383 ]           *Parke*, for George Irton Murthwaite, the person who would be the next heir male of the testator, of the name of Murthwaite, in the event of the nieces dying without issue. \* \* \*

[ 387 ]           *Tindal*, in reply. \* \* \*

[ 388 ]           The following Certificate was afterwards sent :

“ This case has been argued before us, and we are of opinion,

“ First, that John Cuthbertson, the surviving trustee, now has a fee-simple in the freehold estates, and an absolute interest in the leasehold estates, given by the will of the testator to him, Margaret Murthwaite, and John Janes.

“ Secondly, that the testator's three nieces took no legal estate under this will.

“ Thirdly, that George Barnard took no estate under this will.

"Fourthly, that in case the will had commenced with the words, 'all the rents, &c.,' and the passage before those words had been omitted, that the three nieces would have taken estates tail in the freehold, and absolute interests in the leasehold.

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"Fifthly, that George Barnard would now have no estate in the freehold or leasehold tenements. But should he survive the three nieces, and neither of them should have any other child, he will be tenant in tail of the freehold, but have no interest in the leasehold estates. Should he die in the life-time of the three nieces, he would die seised of no freehold, nor possessed of any leasehold estate.

"C. ABBOTT.

"J. BAYLEY.

"G. S. HOLROYD.

"W. D. BEST."

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(3 Barn. & Cress. 191.)

1824.

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WHEN this case came before the Lord Chancellor for judgment, his Lordship agreed with the opinion given by [the] Court [of King's Bench] as to the freehold property; but with respect to the personalty, held that the limitation over [sc. of the beneficial interest] was good.



1824.

[ 422 ]

THOMPSON AND OTHERS *v.* GILES AND OTHERS.†

(2 Barn. &amp; Cress. 422—434; S. C. 3 Dowl. &amp; Ry. 733; 2 L. J. K. B. 48.)

A customer was in the habit of indorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit to the full amount, and he was then at liberty to draw for that amount by cheques on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid: and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away the bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy.

THIS was an action of trover, brought by the plaintiffs to recover the value of certain bills of exchange stated and set forth in the declaration. At the trial before Abbott, Ch. J., at the Summer Assizes for Lancaster, 1822, a verdict was found for the plaintiffs for 2,539*l.*, subject to the opinion of the Court upon the following case.

The plaintiffs were partners under the firm of William Thompson & Co., in a silk manufactory near Lancaster, and for many years past had kept a banking account with Thomas Worswick, Sons & Co. being the firm in which Alexander Andrade and Thomas Worswick carried on their business of bankers prior to their failure. The defendants were the assignees of Alexander Andrade and Thomas Worswick, duly chosen under a commission of bankrupt which issued on the 15th February, 1822. The bills of exchange which were the subject of the action, were received by the bankrupts as such bankers prior to their bankruptcy, on the account of the plaintiffs, and were entered in the account in manner \*hereinafter mentioned. They remained in the bankers' hands till their bankruptcy, when they were taken possession of by the defendants as assignees, and converted to their own use. The account of the plaintiffs with the firm of Thomas Worswick,

[ \*423 ]

† Cited and followed by KNIGHT *parte* Barkworth, *Re Harrison* (1858) BRUCE and TURNER, L.JJ., in *Ex* 6 W. R. 273.—R. C.

Sons, & Co. had continued for many years, and was kept in following form in the pass-book or banking-book, and it was the course of dealing of the bank to keep the accounts in this form.

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*Messrs. W. Thompson & Co. in Account with T. Worswick, Jones, & Co.*

DR.

CR.

1821.	£	s.	d.	1821.	£	s.	d.
July 4. To bank -	80	0	0	July 1. By balance	1300	0	0
5. To draft -	100	0	0	2. bills -	750	0	0

At the end of every half year an account was sent into the plaintiffs from the bankers. In the account at Christmas, 1821, and also in the pass-book, a bill for 689*l.* 16*s.*, one of those in question in the action, was included, being one of several bills paid in on the 10th December, 1821, and it formed part of the cash balance of 941*l.* 2*s.* 5*d.*, therein stated to be due to the plaintiffs. The mode of keeping the account with the plaintiffs and other customers of the bank was this. When the customer paid bills into the bank, such as the bankers approved of, they were never written short, but entered on the day they were paid in in the pass-book, and also in the books of the bank, to the credit of the customer, in the form above stated, and after such entry the customer was at liberty to draw to the full amount, appearing to his credit, by cheques on the bank. Bills disapproved of \*were not so entered, but were sometimes returned, sometimes deposited till due. All bills so entered, whether made specially payable to the customer or not, were indorsed by him, or if for any private reasons he did not wish his name to appear on the bills, a letter was given to the bank, acknowledging himself to be equally liable as if he had indorsed. An interest account was kept, not in the pass-book but in the bank-books, in which the customer was debited with interest, on each cash payment to him, from the date of the payment, and on each payment in bills from the period when the bills were due and paid; and on the other hand he had credit for interest from the date of each cash payment by him, and from the period when each bill paid in by him became due and was paid. As the accounts were balanced half yearly, if a bill was paid in which

[ \*424 ]

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[ \*425 ]

did not become due before the end of the half year, the customer was debited with the interest up to the time when the bill was due. The balance only of the interest was entered in the pass-book, and this was the usual mode of keeping an interest account. If only the undue bills paid in by the plaintiffs were taken out of the account, made up to the 31st December, the plaintiffs' account would at that date appear to be overdrawn; but some of the payments made by the bankers to the plaintiffs, were made in bills payable at future times, and some of these also were undue on the 31st December; and if all the undue bills on both sides had been taken out of the account, made up to the 31st December, the plaintiffs would have been made creditors on that account. At the period of the bankruptcy, the cash balance was in the favour of the plaintiffs, exclusive of the bills in question. It was proved to be the constant usage and course of dealing of this bank, and of others in the \*county of Lancaster, to use bills so paid in by paying them away to their customers as they thought fit. The bank of Worswick & Co. were in the habit of paying away such bills to their customers almost every day and hour, and to the amount of many thousands every week; and the circulation of the town of Lancaster and the county at large was conducted in a great measure by bills so paid in, and afterwards paid away by the bankers; and if that had not been done, each bank would have required an immense unemployed capital of bank notes, or have been obliged to draw on their correspondents in London, and thereby considerably increased their expences. This proof was objected to by the plaintiffs' counsel, but was received, subject to the opinion of the Court as to its admissibility. No direct proof was given that the plaintiffs were acquainted with this practice; and the plaintiffs never received any thing from the bankers but cash notes and bills drawn by the bankers upon their London agents.

*F. Pollock*, for the plaintiffs:

The bills sought to be recovered in this action were entered as bills and not as cash to the credit of the plaintiffs; they remained in specie in the hands of the bankers at the time when they became bankrupts, and may therefore clearly be claimed by the

plaintiffs. A banker is a factor for money. That was established by *Giles v. Perkins*,† which was afterwards acted upon in *Hughes v. Spooner*,‡ tried before BEST, J. at Warwick. From that time this has been universally considered as the law, and the commercial world have been governed by it. That alone would be sufficient to make the Court pause before they overturned \*the decision, even if the propriety of it were not apparent, but it is, in fact, supported by a series of earlier cases: *Ex parte Dumas*,§ *Zinck v. Walker*.|| In *Bolton v. Puller*,¶ the same rule was recognised as law, and that case proceeded entirely on the ground, that the banker had negotiated the bills. The reason for holding, that bills in the hands of a banker do not pass to his assignees, is explained by BULLER, J. in *Bryson v. Wylie*,†† where he observes, that by the course of trade bankers and factors have the goods of other people in their possession, and therefore it does not hold out a false credit to the world.

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[ \*426 ]

*Parke, contrà :*

This is merely a question of fact, and not of law. It is perfectly clear, that where a banker, employed as an agent to receive bills when due, becomes bankrupt, having the bills entrusted to him remaining in specie in his hands, they continue the property of the customer, and do not pass to the assignees. But if, on the other hand, bills are remitted to him on the general account, and are not distinguished from the cash items, then they cannot be reclaimed by the customer. *Ex parte Oursel*,‡‡ *Ex parte Serjeant*,§§ *Ex parte Pease*,||| *Ex parte Wakefield Bank*,¶¶ were mere applications of this rule of law to the facts of those cases. If the relation of principal and agent subsisted between these plaintiffs and the bankrupts, then the former must recover, but if that of debtor and creditor then they have no right of action.

† 9 East, 12.

‡ (Not reported.)

§ 1 Atk. 232; 2 Ves. sen. 582.

|| 2 Bl. 1154.

¶ 4 R. R. 723 (1 Bos. & P. 539).

†† In a note to *Lingham v. Biggs*,  
1 Bos. & P. 83.

‡‡ Amb. 297.

§§ 1 Rose, 153.

||| 1 Rose, 240.

¶¶ 1 Rose, 243.

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(HOLROYD, J. : If the relation of debtor and creditor subsisted, the \*customer might have sued the banker for the amount of the bills, as soon as they were entered to his credit.)

It is to be inferred from the mode of dealing, that the customer was immediately entitled to draw for cash to the amount of the bills. Then it is found that the bankers in the county of Lancaster, and particularly the bankrupts, were in the habit of using the bills paid in as their own; and that practice being well known, it must be presumed that the plaintiffs assented to it, as they never gave any directions to the contrary. Unless the custom was such as to authorize the using of the bills, the bankers would be liable to the penalties imposed by 52 Geo. III. c. 63, which enacted that bankers and others, applying to their own use bills and other property deposited with them, under certain circumstances, and for certain purposes, shall be deemed guilty of a misdemeanor, and be transported for fourteen years, or receive such other punishment allowed by law in cases of misdemeanor, as the Court before whom the party is tried shall adjudge. Yet it could never be said that the acts of the bankrupts in this case were within the meaning of that statute.

(BAYLEY, J. : If they disposed of the bills in the manner stated, knowing themselves to be on the eve of a bankruptcy, they would not, I think, be free from danger.)

There was also evidence of a mode of dealing, when the bankers did not choose to treat the bills as cash, different from that adopted with respect to the bills in question, which confirms the idea that they were treated as cash. *Giles v. Perkins* is certainly an authority for these plaintiffs, if that is to be taken as deciding, as an abstract proposition of law, that a banker is always to be considered as an agent. It has not, however, been so construed, for the most important decisions on the point have arisen since, and the LORD CHANCELLOR \*in them has taken great pains to ascertain from the evidence what bargain was in each case made between the parties: *Ex parte Serjeant*, *Ex parte Pease*. The Court in this case are placed in the situation of a jury, and may,

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therefore, decide upon the facts before them, without feeling bound by former decisions.

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(BAYLEY, J. : In *Giles v. Perkins* it was found that the bills were entered as cash.)

Here one bill for 689*l.* was certainly treated as cash ; it was in effect discounted, for in the half yearly account the customer was charged with interest, and made no objection. But supposing the bankers to have been agents only, still, if they had had the assent of the customer, that they should use the bills as they pleased, they were in their order and disposition, and passed to their assignees under the 21 Jac. I. c. 19, s. 11, the bankrupts not being factors within the meaning of the exception in that statute.

BAYLEY, J. :

I quite agree with the observation, that this is rather a question of fact than of law. But if the circumstances are such as enable us to say, without difficulty, what ought to be the verdict of a jury upon them, we are at liberty to decide the question, when thus brought before us in a special case, although in a special verdict all the facts must be found. It has been argued for the defendants, that we must infer an agreement to have been made between the banker and his customer, that as soon as bills reached the hands of the former, the property should be changed. Undoubtedly, if there were any such bargain, the defendants would be entitled to our judgment ; but if there be no such bargain, then the case of customer and banker resembles that of principal and factor, and the bills remaining in specie in the banker's hands will, notwithstanding the bankruptcy, \*continue the property of the customer. *Scott v. Surman* † and *Bolton v. Puller* establish that as a general rule. That being so, is it probable that such a bargain as that suggested would be made ? What benefit would the customer derive from having the bills considered as the property of the banker ? In the absence of any valuable consideration, it seems to me that it would be very

[ \*429 ]

† Willes, 400.

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unreasonable in a banker to ask, and very imprudent in a customer to accede to such terms. I should not, therefore, be disposed lightly to infer such a contract. But it is said, that it must be inferred from the course of dealing between the parties, and from the usage of the bankrupts, and other bankers in the county of Lancaster. It appears, however, that the bills were not entered as cash, but as bills, and although the amount was carried into the cash column, it does not follow that the customer assented to their being considered as cash. It is only an undertaking on the part of the banker to answer drafts in advance to the amount of the bills so entered. By indorsing the bills paid in, or by giving a guarantee when he did not choose to indorse, the customer might enable the banker to negotiate the bills, and a *bonâ fide* holder might have a right to retain them. But the banker could only be justified in negotiating them when that was rendered a reasonable course by the state of the customer's account. The case, indeed, states it to have been the custom of bankers in the county of Lancaster to use bills paid in by their customers, but it does not state that they so used them as their own, without reference to the customer's account. The cases arising out of Bolderos's bankruptcy, \*which have been referred to,† were not ordinary cases between banker and customer, but between a country banker and a paid agent in London. The LORD CHANCELLOR so considered them, and was therefore under the necessity of examining the facts minutely, in order to ascertain what was the real bargain. *Ex parte Serjeant* comes nearer to this than any other case that has been cited, but still there is a plain distinction between them. There the bills and cash were entered in the running account, without distinction, here credit is given for bills, the items on the face of them appear not to be cash. This case is, therefore, much stronger for the plaintiff than *Ex parte Serjeant* was for the petitioner, yet even there the LORD CHANCELLOR appears to have thought that the customer was entitled to the bills. At all events that case shews, that even where bills are entered as cash, the assent of the customer to their being so considered must be proved, and that the onus of proving it lies on the banker. Upon the whole,

[ \*430 ]

† *Ex parte Pease*, 1 Rose, 240; *Ex parte Wakefield Bank*, 1 Rose, 243.

then, I am of opinion that there is no foundation for supposing that a bargain had been made enabling the banker to use as his own the bills deposited with him. That is a bargain of such a nature as ought not to be presumed without strong evidence. An attempt was made to shew that one bill for 689*l.* stands on a different footing from the rest, because the discount of it was taken into account in settling the balance of interest at the end of the half year preceding the bankruptcy. But the explanation given of the mode of keeping the interest account rebuts any inference of an intent to discount that bill which might otherwise have been drawn from the entry alluded to. The plaintiffs are, therefore, entitled to recover \*the amount of all those bills that remained in the hands of the bankers at the time of their bankruptcy.

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GILES,

[ \*491.]

HOLROYD, J. :

I am of opinion that the bills in question did not, under the circumstances of this case, become the property of the bankers, and that the defendants therefore have not any sufficient answer to this action. It is perfectly clear, as a general rule, and indeed is not disputed on the present occasion, that if a customer pay bills into a banker's hands, although it gives him a right to expect that his drafts will be honoured to the amount of the bills paid in, yet the property in the bills is not altered; they still remain the property of the customer, although the banker may have a lien to the extent of his advances.† The defendants must therefore shew such special circumstances as will operate to change the property, and vest it in the assignees, either as standing in the situation of the bankrupts, or by virtue of the 21 Jac. I. c. 19, s. 11. There is not, I think, sufficient stated in the case to sustain either of those positions. There can be no doubt that the bills were placed in the bankers' hands in order that he might receive the money upon them when due, but they were not in his order and disposition, and therefore not within the 21 Jac. I. c. 19. Can we then say that these bills have, either by operation of law, or by facts raising a conclusion of law, become the property of the bankrupt? The facts stated would not justify such a finding by a jury. In *Giles v. Perkins*, and

† Bills of Exchange Act, 1882, s. 27 (3).



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the case cited, which was tried before my brother *Best*, it was held that an entry of bills as cash was not of itself sufficient to convert the property. The full amount, too, of the bills appears in this instance to have been entered in the cash column. Now it is \*hardly to be supposed that the bankers intended to debit themselves presently with the whole sum that was to be received in future. In order to change the property, it must be shewn that the bankers bought the bills, or discounted them, which is indeed the same thing; then the customer might have immediately sued the bankers for the price which they agreed to give for the bills, but still retained in their hands; and if the customer did not indorse the bills, and they were afterwards dishonoured, the bankers under such circumstances would have no remedy against him. Is there sufficient in this case to shew that the bills were either bought or discounted by the bankers, so as to make the price the property of the customer? They were entered as bills, not as cash, and even if the latter mode of entry had been adopted, it would still, according to *Giles v. Perkins*, admit of explanation. In what light does the banker appear to have considered them in his half-yearly account? In the pass-book they are entered at the full amount; that would not shew that they were discounted. In the interest account interest upon the amount is charged upon each bill until it was actually paid; but when a bill is discounted the interest to be deducted is calculated up to the time when it becomes due, and for no longer period. This, then, is not so strong a case as *Giles v. Perkins*. An argument for the defendants has been founded on the circumstance that the bankers required either an indorsement of the bills, or a guarantee; that was not because they took the property in the bills, but that they might be able to negotiate them as soon as the customer's account rendered such a step necessary. This is said to be a question of fact rather than law. It may be so, but I think that the facts proved were not sufficient in law to change the property; and \*I doubt much whether there was sufficient to enable a jury to find that the customer assented that the bills should become the property of the banker. If that had been intended they would have been entered as cash, deducting the

[ \*433 ]

discount. Upon the general question, therefore, I think that there must be judgment for the plaintiffs, and I am unable to discover any real distinction between the right to the bill for 689*l.*, and the others remaining in the hands of the bankrupts at the time of their bankruptcy.

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GILES.

BEST, J. :

I agree entirely with the opinion expressed by my learned brothers in this case. It is perfectly clear that, if a person places in his bankers' hands bills not due, the property continues in the party paying them in. If by any accident they were destroyed, without the default of the banker, the loss would not fall upon him, but upon the customer. As the property continues in the customer, and as it is well known that bankers receive bills as factors or agents, to obtain payment of them when due, they do not, in case of bankruptcy, pass to the assignees by the 21 J. I. c. 19, s. 11. Bills may be paid in under such circumstances as would furnish evidence of a transfer of the property; but that has been properly treated as a question of fact. The only fact in this case upon which the defendants can rely, and which did not exist in *Giles v. Perkins*, is the custom prevailing amongst the bankers in the county of Lancaster. I much doubt whether evidence of that custom could be received in this case. The property of one person is not to be affected by agreements made between others. The only question here was, how far the plaintiffs assented to give the bankers an absolute control over their bills. There is not a single expression \*in the case to shew such assent. The 52 Geo. III. c. 68,<sup>†</sup> furnishes a strong argument against these defendants, for it shews that the Legislature thought it extremely improper for bankers or others to negotiate bills (amongst other securities) entrusted to their care. I do not mean to say that the bankers in this case incurred any of the penalties imposed by that Act; it is unnecessary to decide that point here; but I would by no means advise persons in their situation to take it for granted that they may with impunity act in the same manner.

[ \*434 ]

*Postea to the plaintiffs.*

<sup>†</sup> Repealed S. L. R. Act, 1887.

1824.

FORBES *v.* COCHRANE AND ANOTHER.

[ 448 ]

(2 Barn. &amp; Cress. 448—473; S. C. 3 Dowl. &amp; Ry. 679; 2 L. J. K. B. 67.)

Slavery is recognized by English courts only as a particular local institution valid within the territorial limits of the particular law which allows it.

Where certain persons, who had been slaves in a foreign country where slavery was tolerated by law, escaped thence and got on board a British ship of war on the high seas: Held, that a British subject, resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship for harbouring the slaves after notice.†

THE declaration stated that the plaintiff was lawfully possessed of a certain cotton plantation, situate in parts beyond the seas, to wit, in East Florida, of large value, and on which plantation he employed divers persons, his slaves or servants. The first count charged the defendants with enticing the slaves away. The second count stated, that the slaves or servants having wrongfully and against the plaintiff's will, quitted and left the plantation and the plaintiff's service, and gone into the power, care, and keeping of the defendants; they, knowing them to be the slaves or servants of the plaintiff, wrongfully received the slaves into their custody, and harboured, detained, and kept them from the plaintiff's service. The last count was for wrongfully harbouring, detaining, and keeping the slaves or servants of the plaintiff after notice given to the defendants; that the slaves were the plaintiff's property, and request made to the defendants by the plaintiff to deliver them up to him. Plea,—Not guilty. At the trial before Abbott, Ch. J., at the London sittings after Trinity Term, 1822, a verdict was found for the plaintiff, damages 3800*l.*, subject to the opinion of the Court on the following case.

The plaintiff was a British merchant in the Spanish provinces of East and West Florida, where he had carried on trade for a great many years, and was principally \*resident at Pensacola in West Florida. East and West Florida were part of the dominions of the King of Spain, and Spain was in amity with Great Britain. The plaintiff, before and at the time of the alleged

[ \*449 ]

† In fact, the ship was in hostile occupation of territorial waters of the State of Georgia: but this, as between British and Spanish jurisdiction and

law, was immaterial; therefore in point of law the head-note is correct.—F. P.

grievances, was the proprietor and in the possession of a cotton plantation, called San Pablo, lying contiguous to the river St. John's, in the province of East Florida, and of about 100 negro slaves whom he had purchased, and who were employed by him upon his plantation. The river St. John's is about thirty or forty miles from the confines of Georgia, one of the United States of America, which is separated from East Florida by the river St. Mary, and Cumberland Island is at the mouth of the river St. Mary on the side next Georgia, and forms part of that State. During the late war between Great Britain and America, in the month of February, 1815, the defendant, Vice-Admiral Sir Alexander Inglis Cochrane, was Commander-in-Chief of his Majesty's ships and vessels on the North American station. The other defendant, Rear-Admiral Sir George Cockburn, was the second in command upon the said station, and his flag ship was the *Albion*. The British forces had taken possession of Cumberland Island, and at that time occupied and garrisoned the same. The *Albion*, *Terror Bomb*, and others of his Majesty's ships of war, formed a squadron under Sir George Cockburn's immediate command off that island, where the headquarters of the expedition were. Sir Alexander Cochrane was not off Georgia during the war, and at the time of the capture of the island he was at a very considerable distance to the southward of Cumberland Island, but Sir George Cockburn was in correspondence with him while he was at the said island. In the year 1814, a proclamation \*had been published by the said Sir Alexander Cochrane as such Commander-in-Chief, and Sir George Cockburn had received great numbers of copies thereof whilst the ships under his command were lying off the Chesapeake, and distributed them at the Chesapeake and amongst the different ships, but none were distributed by the order of the defendant, Sir G. Cockburn, to the southward of the Chesapeake, the southern extremity of which is full 400 miles distant from Cumberland Island. The proclamation stated that it had been represented to him, Sir A. Cochrane, "that many persons then resident in the United States had expressed a desire to withdraw therefrom, with a view of entering into his Majesty's service, or of being received as free settlers into some

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of his Majesty's colonies; and it then notified, that all those who might be disposed to emigrate from the United States would, with their families, be received on board his Majesty's ships or vessels of war, or at the military posts that might be established upon or near the coasts of the United States, when they would have their choice of either entering into his Majesty's sea or land forces, or of being sent as free settlers to the British possessions in North America or the West Indies, where they would meet with all due encouragement." One of these proclamations was seen on Amelia Island, East Florida, which is less than a mile from Cumberland Island, and about thirty miles from San Pablo plantation. In the night of the 23rd February, 1815, a number of the plaintiff's slaves deserted from his said plantation, and on the following day thirty-eight of them were found on board the *Terror Bomb*, part of the squadron at Cumberland Island, and entered on her muster-books as refugees from St. John's. It was reported that they \*came from Seaward, they were mixed with other refugees, and they all spoke English. On the 26th of the same month of February, Sir George Cockburn received from the plaintiff a memorial, stating, that the plaintiff had been a resident in the Spanish provinces of East and West Florida for nearly thirty years, as clerk and partner of a mercantile house established under the particular sanction of the Spanish Government for the purpose of trade with the southern nations of Indians, and which they were allowed to continue by special permission from his Britannic Majesty, pending the two Spanish wars that occurred during that period. The said mercantile house had acquired considerable property in these provinces, and particularly that the plaintiff possessed in East Florida a cotton plantation on the river St. John's, of which he was sole proprietor, and held the same with upwards of 100 negroes at the period of the invasion of the state of Georgia by his Britannic Majesty's forces under the command of him, Sir G. Cockburn, in January preceding; that on the night of the 23rd instant, sixty-two of his said negroes deserted from the plaintiff's plantation, (together with four others belonging to Lindsay Tod his manager,) of whom he had found thirty-four, namely, eighteen men, eight women, and twelve young children of both sexes, together with the aforesaid four

[ \*451 ]

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negroes belonging to Mr. Tod on board of his Majesty's ship *Terror Bomb*, Captain Sheridan. But that the said slaves refused to return to their duty, under pretence that they were then free, in consequence of having come to this island in possession of his Britannic Majesty. The plaintiff therefore prayed, "that the defendant, Sir G. Cockburn, would order the said thirty-eight slaves to be forthwith delivered to him their lawful \*proprietor, together with the boat which they had piratically stolen from his plantation." To this memorial a written answer was sent. A correspondence also took place between the Spanish Governor of East Florida and Sir G. Cockburn relative to the desertion of slaves from the Spanish settlements. This correspondence was previous to Mr. Forbes's letter or memorial, and after the memorial the plaintiff had an interview with the defendant, Sir G. Cockburn, and claimed of him the slaves in question, then on board the *Terror Bomb*, as his property. Sir G. Cockburn told him he might see his slaves, and use any arguments and persuasions he chose to induce them to return. The plaintiff accordingly endeavoured to persuade them to go back to his plantation, and no restraint was put upon them, but they refused to go. The plaintiff then urged his claim very strongly to Sir G. Cockburn, and said he must get redress if he did not succeed in prevailing upon Sir G. Cockburn to order them back again, which Sir G. Cockburn said he could not do, because they were free agents and might do as they pleased, and that he could not force them back. They were victualled and subsisted with Sir G. Cockburn's knowledge whilst on board the *Terror Bomb*, and on the 6th March were removed from that ship by Sir G. Cockburn's orders into his ship, the *Albion*. On the 9th March, 1815, Sir Alexander Inglis Cochrane addressed to Sir G. Cockburn the following letter: "SIR,—Having received and considered your letter, No. 25, of the 28th February, 1815, and the correspondence it incloses respecting some individuals of colour, who have arrived at Cumberland Island, and there placed themselves under the protection of his Majesty, and who have been since represented as having \*escaped from his catholic Majesty's possessions in East Florida, where it is said they were slaves, and in consequence have been formally demanded by the Governor and other claimants of East Florida, I have the

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honour to inform you, that under the circumstances attending these people, I do not consider myself authorised (without reference to his Majesty's Government) to decide upon the claims set forth by the Governor and other persons in East Florida, and, as without such reference, it will be impossible for me to attend to any solicitation of their being given up, you will be pleased to cause the refugees in question to be put on board one of his Majesty's ships going to Bermuda, to be reported to me on their arrival there, and I will take care to have them so guarded as to prevent their desertion, and to be forthcoming, should it be decided that they are to be returned to East Florida." In the same month of March Sir G. Cockburn sailed in the *Albion* with the said slaves on board for Bermuda, at which time he had received intelligence of peace between this country and America, and such slaves as belonged to American subjects, and were in the possession of the defendants, were not taken away in consequence of the wording of the treaty of peace. Bermuda is a British colony, 500 miles from East Florida, or any other land where slavery is acknowledged. The slaves in question were, on the 29th March, 1815, transferred by Sir G. Cockburn's orders, from his Majesty's ship *Albion* into his Majesty's ship the *Ruby*, at Bermuda, and after being on board that ship about twelve months, were landed in that island, and many of them employed in the King's dock-yard there. The slaves which were taken on board the *Albion*, and belonging to the plaintiff, were worth to him 3,800*l*.

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*Comyn* for the plaintiff:

The plaintiff had a property in his slaves, and having been deprived of that property by the act of the defendant, is entitled to maintain this action. Although, by the 47 Geo. III. c. 36, the traffic in slaves has been declared unlawful in a British subject, the Courts of this country still have respect to the trade itself when carried on by the subjects of a state which continues to tolerate it: *Fortuna*,† *Donna Marianna*.‡ The trade is now considered *primâ facie* illegal, and the burden of proof that it is not so, is thrown upon those who carry it on: *Amedie*.§ If this be the law with respect to a trade which one branch of the Legislature

† Dodson, 81.

‡ Ib. 91.

§ Ib. 84.

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of this country (as appears by the preamble of the stat. 51 Geo. III. c. 23) has pronounced to be contrary to the principles of justice and humanity, à fortiori it must prevail with respect to the rights of property in slaves in the subjects of a foreign country, especially when it is considered that slavery is recognised by the Legislature in our own West India islands. It is true, that in this country slavery does not exist; but an action is maintainable for the price of slaves in the courts of this country. In *Butts v. Penny*,† trover was brought for ten negroes. Upon special verdict it appeared by an examination of the record, that the action was brought to recover the value of negroes of which the plaintiff had been possessed in India. It is stated in the report that the Court held, that negroes being usually bought and sold among merchants in India, and being infidels, there might be a property in them sufficient to maintain the action. It appears that no judgment was ever pronounced. The opinion of the Court, however, is an authority to shew, that the right \*of property in slaves, in a country where slavery is allowed, will be recognised by the laws of this country. In *Smith v. Gould*,‡ the action was brought for a negro wrongfully detained in a country where slavery was lawful. This distinction, also, was acted upon by the Court in *Smith v. Brown and Cooper*,§ and it is recognised in *Sommersett's case*.|| These authorities fully establish that this plaintiff had a property in these slaves while in Florida. They made their escape and got on board a British ship, of which one of the defendants Sir G. Cockburn was the commander. He had notice that they were the property of the plaintiff, and *Blake v. Lanyon*¶ is an authority to shew that an action will lie for harbouring an apprentice, after notice that he is the apprentice of the plaintiff, and, by parity of reasoning, the present action is maintainable. The other defendant, Sir A. Cochrane, having concurred in the harbouring of these men, is also liable to be sued.

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*Jervis, contra :*

It may be conceded, that, by the laws of a particular country,

† 2 Lev. 201.

|| State Trials, vol. 20.

‡ 2 Ld. Raym. 1274.

¶ 3 R. R. 162 (6 T. R. 221).

§ 2 Salk. 666.



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one man may have a property in others as his slaves, and that an action may be maintained by him in the courts of this country for an injury done to that property while such his property in the slaves continued. Here, all rights of the plaintiff over those persons (who in Florida had been his slaves) ceased the moment when they got on board the British ship of war. In *Sommersett's* case it was decided, that a person who had been a slave in one of our own settlements, and came to this country, and was here detained by a captain of a ship for the purpose of taking him \*back to such settlement, was entitled to be set at liberty, inasmuch as the law of England did not recognise the state of slavery. Lord MANSFIELD says, "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law." It is incumbent on the plaintiff in this case, therefore, to shew, that at the time when he demanded these slaves to be given up to him, they were his slaves by the positive law of the place where they then were. Now it is clear, that the law of England prevailed on board the British ship. *Madrazo v. Willett* is an authority upon that point, for in that case the Spanish law was recognised by our courts as prevailing on board the Spanish ship, and the slaves were, therefore, considered as property. By parity of reason, these persons who had been slaves ceased to be slaves the moment that they came on board the British ship, because, by the law of England, slavery is not allowed to exist. *Smith v. Brown and Cooper*,† too, is an authority to shew, that, in order to maintain an action for the price of a slave, it must be shewn, on the face of the pleadings, that the parties were slaves by the law of the particular place where the sale took place. The right to property in slaves, therefore, is conferred by the municipal law of the place only, and can be enforced only for an injury to such property while the slave is within that place. If a British subject, resident in such a country, committed a violation of such a right, he might possibly be answerable for it in the courts of this country. The right, however, being created only by the municipal law, must be co-extensive with it. If a master, therefore, brings his \*slave to

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† 22 R. R. 422 (3 B. & Ald. 353).

† 2 Salk. 666.

a place where slavery is unlawful, an action is not maintainable against another person for detaining or harbouring the slave, because there is no obligation on the latter to return to the service from which he has escaped.

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BAYLEY, J. :

It is a matter of great satisfaction to me that this case, which is one of considerable importance, and of some novelty, may, at the option of either party, be turned into a special verdict. At present the impression upon my mind is, that the action is not maintainable. The cases decided in the Admiralty Courts are not applicable to the present. There certain persons had taken upon themselves to be active, and to seize ships having slaves on board, on the ground that they had a right so to do, either by the law of nations or the law of this country. The Court of Admiralty refused to assist the captors in condemning that property, to which the claimants, by the law of the particular country to which they belonged, had a right. In such cases the Court of Admiralty is called upon to act between the two countries upon a common principle applicable to both. That Court, therefore, cannot lend its assistance in the condemnation of a vessel, on the ground that it is engaged in a traffic which, according to the municipal laws of the country to which the claimant belongs, is no wrong. The captain of the *Fortuna* had done no act that subjected him to condemnation by the laws of his own country, and this country had no right to say that he had been doing wrong, or that his property was subject to condemnation. In substance, therefore, the decision of that court operates only in the nature of an *amoveas manus* and no more. In *Madrazo v. Willes*, the defendant had taken upon himself \*to be active, and to seize the ship and slaves, and the Court held that he had no right to make the seizure. Having thus disposed of the authorities referred to in argument, I now come to consider the question for our decision. My opinion in this case does not at all proceed upon the ground that slavery is not to be tolerated in the place where these slaves came on board; nor that an action, under circumstances, may not be maintained for enticing away or harbouring a slave: nor on the ground that the instant

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he leaves his master's plantation and gets upon other land, where slavery is not tolerated, that, *ex necessitate*, he becomes, to all intents and purposes, a free man. I give no opinion upon any one of these points; but I say that there is a great distinction between making the law of England active, and leaving the law of England passive. In the cases cited from the Admiralty Courts, the law of England was passive. Here we are called upon to put that law into activity upon the ground that the defendants have done a wrong. I am of opinion, however, that we are not warranted in coming to that conclusion, with reference to the character which the defendants at that time were filling. The ground of complaint alleged in the first count of the declaration is, that the defendant enticed the slaves: there is no evidence to support that count. The second count charges, that the defendants harboured the slaves, knowing them to be the slaves of the plaintiff: and the third count, that they harboured them after notice. *Blake v. Lanyon*<sup>†</sup> is an authority to shew that the latter is a good ground of action. It is unnecessary, therefore, to consider whether there was evidence \*to shew that the defendants knew the slaves to belong to the plaintiff. But a very material allegation in all the counts is, that the defendants wrongfully did the act with which they are charged; the question is, whether that allegation was made out against either of the defendants? In *Blake v. Lanyon* the defendant must have had full opportunity of making inquiry, and satisfying himself whether that which was asserted on the part of the plaintiff was true or not. There could be no difficulty in ascertaining, with respect to a person in this kingdom, whether he was the servant of A. B. or not; but a captain of an English man of war, engaged in foreign service, has not the same means of satisfying himself upon such a fact. It might have been wholly inconsistent with the duties which he had to perform, in his character of a servant of the public, either to leave his ship, in order to make such enquiry himself, or to dispatch persons in that public service to enquire whether these slaves belonged to the plaintiff or not. Supposing, during the absence of any of the persons detached on such duty, an occurrence had happened

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<sup>†</sup> 3 R. R. 162 (6 T. R. 221).

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which required the exertions of the whole crew, it would have been no excuse to the Government of this country for him to say, that he had detached some of his crew to ascertain whether certain persons who had come to his ship, and had been claimed as slaves by several persons residing in different places, in fact belonged to them. It might happen that every one of the slaves came from different places, and belonged to different owners, and it would have been necessary to make inquiries at each place. In this case the ship was within one mile of the shore, but it might have been fifty miles off. I am of opinion \*that the defendants were bound to act *bonâ fide*. If it could be made out that they acted *malâ fide*, they would be liable to an action, but in order to support an action against a person who fills a public office like that which the defendants in this case filled, it is essential to shew that they acted *malâ fide*. In this case the plaintiff claims the slaves as his own, and desires that they should be dismissed from the defendants' ship and put into his possession. Sir G. Cockburn said that they might go if the plaintiff could persuade them to go; but they refused to go. It is said that Sir G. Cockburn ought to have sent them away from his ship, but to what place was he to send them? They would refuse to go to East Florida, and if he was bound to give them a boat, they would have the option of going where they thought fit, and probably would have gone to Cumberland Island; but the plaintiff desired to have them put in his possession, not to have them set at large. Sir G. Cockburn was called upon to consider a nice question of law, upon which legal men might entertain a difference of opinion, viz. whether a man who is a slave in a country where slavery is tolerated, continues a slave when he goes out of the limits of that state, and whether neutrals are warranted in treating him as such. It appears to me, that Sir G. Cockburn acted *bonâ fide*. If he had said, "these men shall not remain longer in my ship, but I will not put them into your possession; they shall go where they will;" it is clear that they would not have gone back into the plaintiff's service. Instead of that, however, Sir G. Cockburn writes to Sir A. Cochrane for instructions, and the latter considers it a question fit to be decided upon by the Government,

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and directs that the slaves should be conveyed to a place \*of security, where they might be forthcoming for the benefit of the plaintiff, if the Government should decide that they should be restored to him. It appears to me, therefore, that the character of *mala fides* does not attach upon either of the defendants in this case, and that being so, I am of opinion that they did not, in the language of this declaration, *wrongfully* harbour, detain, and keep the slaves. Their character, as public officers, placed them in a different situation from that in which other individuals would stand ; and, upon that ground, I am of opinion that the plaintiff is not entitled to maintain this action.

HOLROYD, J. :

I am also of opinion that the plaintiff is not entitled to maintain the present action. The declaration alleges, that the plaintiff was the proprietor, and in the possession of a cotton plantation lying contiguous to the river St. John, in East Florida, on which land he employed divers persons, his slaves or servants. The plaintiff, therefore, claims a general property in them as his slaves or servants, and he claims this property, as founded, not upon any municipal law of the country where he resides, but upon a general right. This action is therefore founded upon an injury done to that general right. Now it appears, from the facts of the case, that the plaintiff had no right in these persons, except in their character of slaves, for they were not serving him under any contract ; and, according to the principles of the English law, such a right cannot be considered as warranted by the general law of nature. I do not mean to say that particular circumstances may not introduce a legal relation to that extent ; but assuming that there may be such a relation, it can only have a \*local existence, where it is tolerated by the particular law of the place, to which law all persons there resident are bound to submit. Now if the plaintiff cannot maintain this action under the general law of nature, independently of any positive institution, then his right of action can be founded only upon some right which he has acquired by the law of the country where he is domiciled. If he, being a British subject, could shew that the defendant, also a British

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subject, had entered the country where he, the plaintiff, was domiciled, and had done any act amounting to a violation of that right to the possession of slaves which was allowed by the laws of that country, I am by no means prepared to say that an action might not be maintained against him. The laws of England will protect the rights of British subjects, and give a remedy for a grievance committed by one British subject upon another, in whatever country that may be done. That, however, is a very different case from the present. Here, the plaintiff, a British subject, was resident in a Spanish colony, and perhaps it may be inferred, from what is stated in the special case, that, by the law of that colony, slavery was tolerated. I am of opinion, that, according to the principles of the English law, the right to slaves, even in a country where such rights are recognised by law, must be considered as founded not upon the law of nature, but upon the particular law of that country. And, supposing that the law of England would give a remedy for the violation of such a right by one British subject to another (both being resident in and bound to obey the laws of that country) still the right to these slaves being founded upon the law of Spain, as applicable to the Floridas, must be co-extensive with the territories of that State. I do not mean to say, \*that if the plaintiff having the right to possess these persons as his slaves there, had taken them into another place, where, by law, slavery also prevailed, his right would not have continued in such a place, the laws of both countries allowing a property in slaves. The law of slavery is, however, a law *in invitum*; and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country, without doing any wrongful act. This has been decided to be the law with respect to a person who has been a slave in any of our West India colonies, and comes to this country. The moment he puts his foot on the shores of this country, his slavery is at an end. Put the case

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of an uninhabited island discovered and colonized by the subjects of this country ; the inhabitants would be protected and governed by the laws of this country. In the case of a conquered country, indeed, the old laws would prevail, until altered by the King in council ; but in the case of the newly discovered country, freedom would be as much the inheritance of the inhabitants and their children, as if they were treading on the soil of England. Now, suppose a person who had been a slave in one of our own West India settlements, escaped to such a country, he would thereby become as much a freeman as if he had come into England. He ceases to be a slave in England, only because there is no law which sanctions his detention in slavery ; for the same \*reason, he would cease to be a slave the moment he landed in the supposed newly discovered island. In this case, indeed, the fugitives did not escape to any island belonging to England, but they went on board an English ship (which for this purpose may be considered a floating island), and in that ship they became subject to the English laws alone. They then stood in the same situation in this respect as if they had come to an island colonized by the English. It was not a wrongful act in the defendants to receive them, quite the contrary. The moment they got on board the English ship there was an end of any right which the plaintiff had by the Spanish laws acquired over them as slaves. They had got beyond the control of their master, and beyond the territory where the law recognising them as slaves prevailed. They were under the protection of another Power. The defendants were not subject to the Spanish law, for they had never entered the Spanish territories, either as friends or enemies. The plaintiff was permitted to see the men, and to endeavour to persuade them to return ; but in that he failed. He never applied to be permitted to use force ; and it does not appear that he had the means of doing so. I think that Sir G. Cockburn was not bound to do more than he did ; whether he was bound to do so much it is unnecessary for me to say. It was not a wrongful act in him, a British officer, to abstain from using force to compel the men to return to slavery. It does not appear that he prevented force being used. I do not say that he might not have refused, but in fact there was no refusal. I have given my

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opinion upon this question, supposing that there would be a right of action against these defendants, if a wrong had actually been done by them, but I am by no means \*clear, that even under such circumstances, any action would have been maintainable against them by reason of their particular situation as officers acting in discharge of a public duty, in a place *flagrante bello*. I doubt whether the application ought not to have been made in such a case to the governing powers of this country for redress. The cases from the Admiralty Courts are distinguishable from the present, upon the grounds already stated by my brother BAYLEY. In *Madrazo v. Willes* the plaintiff was a Spanish subject, and by the law of Spain slavery and the trade in slaves being tolerated, he had a right by the laws of his own country to exercise that trade. The taking away the slaves was an active wrong done in aggression upon rights given by the Spanish law. That is very different from requiring, as in this case, an act to be done against the slaves, who had voluntarily left their master. When they got out of the territory where they became slaves to the plaintiff and out of his power and control, they were, by the general law of nature, made free, unless they were slaves by the particular law of the place where the defendant received them. They were not slaves by the law which prevailed on board the British ship of war. I am, therefore, of opinion that the defendants are entitled to the judgment of the Court.

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BEST, J. :

The feelings which are naturally excited by a discussion of the subject of slavery may perhaps betray me into some warmth of expression ; I beg, however, that nothing which I say may be considered as trenching upon the local rights of the proprietors of lands in our West India islands to the services of their slaves in that country. They have acquired those \*rights under the encouragement of the Legislature of this country, and they ought not to be put in jeopardy by any power in this country, unless a complete compensation be given to them by the public for the capital which they have been encouraged to embark in such property. The crime of slavery is the crime of the nation, and

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every individual in the nation should contribute to put an end to it as soon as possible. It is a relation which ought not to be continued one moment longer than is necessary to fit the slave for a state of freedom. For our convenience or our gain it ought not to be allowed to exist.

The plaintiff, in this case, states his rights in terms so general that possibly the declaration might have been bad upon demurrer, although it is sufficiently certain after verdict. It is incumbent upon us, however, to see what sort of servants the plaintiff claims. It is clear, from the case, that they were not servants in our sense of the word; that they were not servants by contract, but slaves. The first objection that occurs to me in this case is, that it does not appear upon the special case, that the right to slaves exists in East Florida. That right is not a general but a local right; it ought, therefore, to have been shewn that it existed in Florida, and that the defendants knew of its existence. Assuming, however, that those facts did appear, still, under the circumstances of this case, this action could not be maintained. These slaves were not seduced from the service of their employer by any act of the defendants; if they had, the case would have been very different. The plaintiff, therefore, can only be entitled to recover upon the count which charges the defendants with harbouring the slaves.

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Then the question is, were these persons slaves at the time when Sir G. Cockburn refused to do the act which he was desired to do? I am decidedly of opinion that they were then no longer slaves. The moment they put their feet on board of a British man of war, not lying within the waters of East Florida, (where, undoubtedly, the laws of that country would prevail,) those persons who before had been slaves, were free. The defendants were not guilty of any act prejudicial to the rights which the plaintiff alleges to have been infringed. Those rights were at an end before the defendants were called upon to act. Slavery is a local law, and, therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognised by the local law, they have broken their chains, they have escaped from their

prison, and are free. These men, when on board an English ship, had all the rights belonging to Englishmen, and were subject to all their liabilities. If they had committed any offence they must have been tried according to English laws. If any injury had been done to them they would have had a remedy by applying to the laws of this country for redress. I think that Sir G. Cockburn did all that he lawfully could do to assist the plaintiff; he permitted him to endeavour to persuade the slaves to return; but he refused to apply force. I think that he might have gone further, and have said that force should not be used by others; for if any force had been used by the master or any person in his assistance, can it be doubted that the slaves might have brought an action of trespass against the persons using that force? Nay, if the slave, acting upon his newly recovered right of freedom,\* had determined to vindicate that right, originally the gift of nature, and had resisted the force, and his death had ensued in the course of such resistance, can there be any doubt that every one who had contributed to that death would, according to our laws, be guilty of murder? That is substantially decided by *Sommersett's* case, from which, it is clear, that such would have been the consequence had these slaves been in England; and so far as this question is concerned, there is no difference between an English ship and the soil of England; for are not those on board an English ship as much protected and governed by the English laws as if they stood upon English land? If there be no difference in this respect, *Sommersett's* case has decided the present: he was held to be entitled to his discharge, and, consequently, all persons attempting to force him back into slavery would have been trespassers, and if death had ensued in using that force would have been guilty of murder. It has been said, that Sir G. Cockburn might have sent them back. He certainly was not bound to receive them into his own ship in the first instance, but having done so, he could no more have forced them back into slavery than he could have committed them to the deep. There may possibly be a distinction between the situation of these persons and that of slaves coming from our own islands, for we have unfortunately recognised the existence of slavery there, although we have never recognized it in our own country.

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The plaintiff does not found his action upon any violation of the English laws, but he relies upon the comity of nations. I am of opinion, however, that he cannot maintain any action in this country by the comity of nations. Although the English law has recognised \*slavery, it has done so within certain limits only; and I deny that in any case an action has been held to be maintainable in the municipal courts of this country, founded upon a right arising out of slavery. Let us look to the history of the odious traffic out of which the relation of master and slave in the West Indies has arisen. Queen Elizabeth expressed her hope to Sir John Hawkins that the negroes went voluntarily from Africa to submit to domestic slavery in another country, and declared, that if any force was used to enslave them, she doubted not it would bring down the vengeance of heaven upon those who were guilty of such wickedness. It is unfortunate, however, for the memory of that Queen, that in her reign patents were granted to encourage the trade, and those were followed up by Acts of Parliament expressly recognising it. The Legislature interfering from motives of humanity, regulated the mode of transporting slaves, and also the making of insurances upon them. An Act was also passed soon after we had accomplished our own liberty, viz. the 9 & 10 Will. III. c. 26, ss. 7,† 8, 9, which certainly speaks of these unhappy beings by the degrading appellation of merchandize, and of their being brought to England, not as the termination of the voyage, but as a place at which ships might call. I think, however, that notwithstanding that Act, if they had come here and got within the waters of England, they might have been discharged by means of writs of *habeas corpus*. There was also a statute passed in the reign of Geo. II.,‡ by which slaves in the West India islands, like other property, were made saleable, and subject to the debts of the persons to whom they belong. Both those statutes, however, were local in their application,

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being \*confined to the West India islands only. I do not, therefore, feel myself fettered by any thing expressed in either of them, in pronouncing the same opinion upon the rights growing out of slavery, as if they had never passed. If, indeed, there had been

† Repealed S. L. R. Act, 1867. S. L. R. Act, 1887).

‡ 5 Geo. II. c. 7, s. 4 (repealed

any express law, commanding us to recognise those rights, we might then have been called upon to consider the propriety of that which has been said by the great commentator upon the laws of this country, "that if any human law should allow or injoin us to commit an offence against the divine law, we are bound to transgress that human law."†

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There is no statute recognizing slavery which operates in the part of the British Empire in which we are now called upon to administer justice. It is a relation which has always in British Courts been held inconsistent with the constitution of the country. It is matter of pride to me to recollect that, whilst economists and politicians were recommending to the Legislature the protection of this traffic, and senators were framing statutes for its promotion, and declaring it a benefit to the country, the judges of the land, above the age in which they lived, standing upon the high ground of natural right, and disdaining to bend to the lower doctrine of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject matter of property. As a lawyer I speak of that early determination, when a different doctrine was prevailing in the senate, with a considerable degree of professional pride.

I say there is not any decided case in which the power to maintain an action arising out of the relation of \*master and slave has been recognised in this country. I am aware of the case in Levinz, but there the question was never decided, and if it had, in the case of *Smith v. Gould*, the whole Court declared that the opinion there expressed is not law. And the same had before been said by Lord Holt in the case of *Chamberlain v. Harvey*.‡ The case of *Smith v. Brown and Cooper* has been misunderstood. It has been supposed to establish the position, that an action may be maintained here for the price of a negro, provided the sale took place in a country where negroes were saleable by law.§ But that point was not decided. The Court

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† Bl. Com., vol. i. p. 42.

‡ 1 Ld. Raym. 146.

§ Such a contract (both made and to be performed in Brazil, where the slaves were lawfully held by the

seller) was held valid by the Exchequer Chamber in 1860: *Santos v. Illidge*, 8 C. B. N. S. 861, 29 L. J. C. P. 348.

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only held, that the question could not be agitated unless that fact was averred on the face of the declaration. In this case the slaves belonged to the subject of a foreign State. The plaintiff, therefore, must recover here upon what is called the *comitas inter communitates*; but it is a maxim, that that cannot prevail in any case where it violates the law of our own country, the law of nature, or the law of God. The proceedings in our Courts are founded upon the law of England, and that law is again founded upon the law of nature and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English municipal courts cannot recognise it. I take it, that that principle is acknowledged by the laws of all Europe. It appears to have been recognised by the French Courts in the celebrated case alluded to by Mr. Hargrave in his argument in *Sommersett's* case. Mr. Justice Blackstone in his Commentaries, vol. i. p. 42, says, "upon the law of nature and the law of revelation, depend all human laws; that is to say, no human law should be suffered to contradict \*these." Now if it can be shewn that slavery is against the law of nature and the law of God, it cannot be recognised in our Courts. In vol. i. p. 424, the same writer says, "the law of England abhors, and will not endure the existence of slavery within this nation;" and he afterwards says, that "a slave or negro, the instant he lands in England, becomes a freeman, that is, the law will protect him in the enjoyment of his person and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before;" and then, after some other observations which it is unnecessary to notice, he says, "whatever service the heathen negro owed of right to his master, by general, not by *local* law, the same (whatever it be) is he bound to render when brought to England and made a Christian." Whatever service he owed by the local law, is got rid of the moment he got out of the local limits. Now what service can we owe by the general law? Service to our country, service to our relations for the protection they have afforded us, and service by compact. A state of slavery excludes all possibility of a right to service arising by either of these means. A slave has no country, he is not reared by or for his

[ \*472 ]

parents, or for his own benefit, but for that of his master, he is incapable of compact. We have the authority of the civil law for saying that slavery is against the rights of nature, Inst. lib. 1, tit. 3, s. 2. The Legislature of this country has given judgment upon the question. They have abolished the trade in slaves, they have even bought up at a great price the right of other countries to carry it on. We might, perhaps, have called upon them to abandon the traffic without remuneration. It might have been glorious thus to \*put down an usurpation against the rights of nature, but we had participated too largely in the iniquitous traffic to be justified in throwing the first stone, and may be considered as having paid this sum as a sin-offering for our transgressions. In *Sommersett's case*† Lord MANSFIELD observes, "The difficulty of adopting the relation without adopting it in all its consequences is indeed extreme, and yet many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate." *Sommersett* was discharged. He might then have maintained an action against those who had detained him; and if that be so, how can any action be maintained against these defendants for not assisting in the detention of these men? The place where the transaction took place was, with respect to this question, the same as the soil of England. Had the defendants detained these men on board their ships near the coast of England, a writ of *habeas corpus* would have set them at liberty. How then can an action be maintained against these gallant officers for doing that of their own accord which, by process of law in a British court of justice, they might have been compelled to do? I have before adverted to the narrower ground upon which this case might have been decided, but if slavery be recognised by any law prevailing in East Florida, the operation of that law is local. It is an anti-christian law, and one which violates the rights of nature, and therefore ought not to be recognised here. For these reasons I am of opinion that our judgment must be for the defendants.

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[ \*473 ]

*Judgment for the defendants.*

† 20 Howell's St. T. 79.

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*Feb. 3.*

DOE DEM. HARRIS *v.* MASTERS.

(2 Barn. & Cress. 490—492; S. C. 4 Dowl. & Ry. 45; 2 L. J. K. B. 117.)

[ 490 ]

Where a lease contained a proviso that, if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made:" Held, that the rent having been in arrear for the time specified, an ejectment might be maintained without actual re-entry, and without any demand of the rent.

[ \*491 ]

EJECTMENT to recover possession, for non-payment of rent, of a certain chapel called Spring Garden Chapel, situate in Spring Gardens, in the parish of Saint Martin in the Fields, in the county of Middlesex. At the trial before Abbot, Ch. J. a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case. The lessor of the plaintiff, James Harris, by a certain indenture of lease dated the 7th day of March, 1821, and made between the said James Harris of the one part, and the said George Masters of the other part, demised unto the said defendant the said chapel, called Spring Garden Chapel, for the term of seven years wanting fourteen days, from the 25th day of March then instant, at the yearly rent of 250*l.* payable half yearly, on the 29th day of September \*and the 25th day of March, without deduction, except as therein after mentioned; the first half yearly payment to be made on the 29th day of September then next ensuing; and the said defendant did, amongst other things, covenant with the said James Harris, that he would pay the reserved rent on the days and times appointed by the lease for the payment thereof. The lease contained also the following proviso, "Provided always, and it is hereby declared and agreed by and between the said parties hereto, and these presents are upon this express condition, nevertheless, that in case the said rent shall be behind or unpaid for the space of twenty-one days next after the respective days, whereon the same respectively are hereinbefore appointed to be paid as aforesaid, although and notwithstanding no formal or legal demand shall be made for payment thereof; that then and in such case, it shall and may be lawful for the said James Harris, into and upon the said hereby demised premises, or any part thereof, in the name of the whole wholly to re-enter." On the 25th day of March, 1822, the

second half-year's rent became due, which not having been paid, or offered to be paid, Mr. Harris brought this ejectment, laying the demise therein on the 26th day of April last. No demand was made on the part of the said James Harris of the rent, nor was any formal re-entry made for breach of the covenant, and there was sufficient distress on the premises to countervail the arrears of rent.

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*Abraham* for the plaintiff:

This case is not to be decided by the common law, or by the 4 Geo. II. c. 28,<sup>†</sup> but by the special provision in the lease, that the lessor should be \*at liberty to re-enter for non-payment of rent, although no formal or legal demand should have been made. In *Dormer's* case<sup>‡</sup> it is said, that "by special consent of the parties re-entry may be for default of payment of rent without demand of it." So in *Goodright v. Cator*,<sup>§</sup> a proviso for re-entry for non-payment of rent, "although no demand thereof should be lawfully made," was held to dispense with any demand at all.

[ \*492 ]

*Curwood, contra* :

It is stated in the case that no demand of the rent was made, and that there was a sufficient distress on the premises. Now the Court will construe the lease strictly, as this action is brought to take advantage of a forfeiture. At common law great niceties were to be observed in making a demand of rent, and the stipulation in this lease, "that no legal or formal demand should be necessary," was intended to relieve the lessor from those niceties, but not from the necessity of making any demand. Then there was no re-entry: it will be said that bringing the action was sufficient, but the contract must be construed strictly, and that only gives a right of re-entry.

PER CURIAM :

It has been decided in many cases that an actual entry need not be proved in such a case as this. As to the other point, *Dormer's* case and *Goodright v. Cator* are decisive. By the

<sup>†</sup> S. 2. (Repealed S. L. R. Act, 1887.)

<sup>‡</sup> 5 Co. Rep. 40.  
<sup>§</sup> 2 Doug. 477.



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covenant in this lease, the defendant has dispensed with all such demand as the law would otherwise have required.

*Postea to the plaintiff.*

1824.

[ 499 ]

# RICHTER v. HUGHES.

(2 Barn. & Cress. 499—510; S. C. 3 Dowl. & Ry. 788; 2 L. J. K. B. 61.)

Where parties who have a limited authority under an Act of Parliament to raise money by means of a rate, with powers of distress, raise by borrowing a larger sum than they are authorised to do, and impose a rate for the purpose of paying the money so borrowed, the rate is bad *in toto*, and a distress made to recover it is unwarranted.

[ \*500 ]

DECLARATION in replevin for taking plaintiff's goods. The defendant avowed, as collector of rates imposed by 51 Geo. III. c. 184, entitled, "An Act for erecting a chapel of ease at Islington," for several assessments upon the plaintiff duly made by the trustees for the purposes mentioned in the Act. The avowry stated a demand by the defendant upon the plaintiff, that he was summoned before a magistrate for non-payment, and upon default warrants were issued, under which distress was made. Plea in bar, that by the Act, under and by virtue and for the purposes of which the said \*assessments or rates were made, it was enacted that it should be lawful for the trustees to erect and build a chapel, with vaults under the same for the burial of the dead, and also to enclose a sufficient quantity of ground for a cemetery or burial ground thereto; that the trustees were empowered to borrow any sum of money necessary for the purposes of that Act, not exceeding in the whole the sum of 30,000*l.*, which monies so to be borrowed, and the interest thereof, were thereby charged upon, and made payable from time to time out of the fees and sums of money which should be received by the collector for the time being, on account of the burials in the said burial ground, and out of the rates and assessments to be made in pursuance of that Act: and for securing the repayment of the money so to be borrowed, and the interest thereof, the said trustees in manner therein mentioned were authorised to assign over the same fees and sums of money, rates, and assessments, to persons advancing

and lending such money from time to time, and when they should judge necessary to grant annuities to any person who should contribute, advance, and pay unto the said trustees, any sum of money for the absolute purchase of any annuity, and payable during the life of every contributor, so that the whole money to be raised by the granting of annuities as aforesaid, did not exceed the whole sums intended to be raised for the purposes of that Act; and every annuity was thereby charged upon and made payable out of the fees, sums of money, rates, and assessments, to be made under and by virtue of the said Act. The plea then set out the 35th section of the Act, which recited, that the fees or sums of money to be payable \*in respect to burials or interments of the dead in the said new chapel or burial ground, would be insufficient to answer the purposes of that Act; and then enacted, that it should be lawful for the trustees to make assessments or rates upon all the then present and future tenants and occupiers of any house, buildings, &c. within the parish, according to yearly improved value of the premises, and as the same were ascertained and rated in the poor-rate books of the said parish for the time being, and not exceeding the sum of 2s. 6d. in the pound of the yearly value of such buildings, lands, &c.; and which rates or assessments should be paid quarterly, and the same when received, were thereby vested in the trustees in trust, to be applied by them for the purposes of that Act, for and during such time as any of the monies to be borrowed upon the credit of that Act should remain due, or any of the annuities to be granted in pursuance or by virtue of that Act, should have continuance and no longer.† Averment, that before the making of the said several assessments and rates

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[ \*501 ]

† Besides the clauses of the Act set out in the plea, the following sections were referred to in argument. The seventh section, by which the trustees were authorised to appoint a treasurer, clerk, and collectors, and such other officers and persons as they (the trustees) should think proper, and out of the monies to be received by virtue of the Act, to allow and pay such salaries, wages, and allowances to those officers as

they (the trustees) should think reasonable. Section 26, by which the trustees were authorised, out of the fees and rates, to pay every year to the minister or curate any sum not less than 150*l*. Section 30, by which the trustees were authorised, out of the same fund, to pay to the clerk of the chapel for his salary such sum as they should think proper.

RICHTER in the avowry mentioned, the said trustees had wrongfully,  
HUGHES. without any lawful authority, and in excess and abuse of the  
[ \*502 ] powers and authority \*given to them by the Act, raised by way  
of annuity, and by borrowing a sum much beyond the said sum  
of 30,000*l.*, which sum and no more they were by the said Act  
authorised and empowered to raise either by annuities or  
borrowing, to wit, the sum of 30,136*l.* by annuities, and the  
sum of 2,500*l.* by borrowing, and exceeding by 2,636*l.* the sum  
they were by the said Act empowered to raise as aforesaid; that  
the said several assessments and rates in the avowry mentioned  
were made, for, among other purposes, the purpose of paying  
the said annuities, and the said money so borrowed as aforesaid,  
and which so exceeded the sum by the said Act authorised to  
be raised as aforesaid, and so wrongfully raised as aforesaid.  
And that the said rates or assessments in the said avowry  
mentioned, were not made for the purposes and according to the  
said Act, but were each illegal and void. Replication, that at  
the time of making the assessments or rates in the avowry  
mentioned, the fees payable in respect of burials in the chapel  
and burying-ground were insufficient to answer the purposes of  
the Act; and that divers annuities granted in pursuance of the  
Act then had continuance, and that, at the time of making the  
rates, it was necessary in order to raise money to carry into  
effect the purposes of the Act, to make an assessment or rate in  
the manner mentioned in the Act of Parliament, and the said  
assessments or rates were respectively made upon the tenants  
and occupiers, and according to such yearly rent or value as in  
the Act required; and each of the assessments was made, and  
was upon the face thereof stated to be made by five or more  
trustees, &c. met in the vestry room, and for certain times  
[ \*503 ] therein \*mentioned respectively, pursuant to the powers vested  
in them by the Act, without specifying any purpose for which  
such assessments or rates were so made; and that none of the  
said assessments or rates were by the title thereof, or otherwise  
expressed to be made for any such purposes as in the plea  
mentioned; and that the said rates and assessments were  
respectively made pursuant to the powers vested in the trustees  
by the Act, and were in fact made for, amongst other purposes,

the purpose of paying the annuities so lawfully granted under and by virtue of the said Act of Parliament, and so then continuing. To this replication the plaintiff demurred.

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*Chitty* was to have argued in support of the demurrer, but the Court called upon

*Parke, contra* :

It is admitted upon these pleadings that the trustees have raised 2,636*l.* beyond 30,000*l.* Now, assuming that it was illegal for them to raise money to be appropriated to the payment of the excess above that sum, still the rate on the face of it was good, and the collector had a right under this Act of Parliament to take the distress. In cases of this description the question has always been, whether the rate on the face of it appears to have been made for legal or illegal purposes: *Rex v. Hardy*,† *Rex v. Brograve*.‡ If it be for legal purposes the rate has been held to be good, even though the money raised may have been likely to be misapplied. In *Rex v. The Mayor and Burgesses of Gloucester*,§ the rate \*was for more than it ought to have been, for the Act under which it was made empowered the making of a rate to reimburse existing overseers their reasonable expences, but the rate was really for raising a sum to reimburse former overseers; the Court, however, held themselves bound by what appeared on the face of the rate itself, and decided that it was good. Here the trustees have the power of making a rate, provided it shall not exceed 2*s.* 6*d.* in the pound. But the rate is not rendered bad because there may have been an intention on the part of the trustees to apply a small part of the money raised to illegal purposes. It is admitted upon the pleadings, that the rate was duly made; that the burial fees were insufficient to answer the purposes of the Act; that annuities were in existence; and that it was necessary for the trustees to raise money by assessments, to carry into effect the purposes of the Act; and that the purposes mentioned in the plea were not mentioned in the assessments; it was therefore, a good rate upon the face of it. Although the trustees

[ \*504 ]

† Cowp. 579.

§ 5 T. R. 346.

‡ 4 Burr. 2491.

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have, in fact raised more money than they were authorised to do, that, according to the authorities, is no objection to the rate itself; but the party, if he objected to the quantum of the rate, ought to have appealed to the Quarter Sessions.

[ \*505 ]

(BAYLEY, J.: There is a material distinction between this case and the cases which you have cited. They were the cases of poor-rates. Now, the overseers of the poor are at liberty from time to time to raise prospectively by rates, sufficient sums for the relief of the poor. Those sums cannot be specifically limited; for the overseers cannot, *à priori*, say how much they shall want for such a purpose. Here, on the other hand, the \*trustees are authorised by the Act, in the first place to raise a definite sum by loan or annuity, and then to raise by rate so much money as will be sufficient to pay either the common or annuity interest upon the sum borrowed, together with such sum as is sufficient to pay the salary of the clergyman.)

The sum which the trustees are empowered to borrow is definite and specific, but that which they are authorised to raise by rates is indefinite. By the seventh section they are authorised out of the monies to be received under the Act, to pay such salaries, &c. to the treasurer and other officers as they shall think reasonable. The sums are indefinite; there is no limitation, therefore, to the sums which they are authorised to raise. They are authorised to raise money for a variety of purposes, and those purposes include the interest of a specific sum. Although they have borrowed more than that sum, still the rate has been raised for the purposes of the Act, and that is sufficient. The only limitation put upon the rate in the clause empowering the trustees to make it is that it shall not exceed the sum of 2s. 6d. in the pound.

BAYLEY, J.:

The question in this case arises upon the validity of a rate made under the provisions of a local Act of Parliament passed for a specific purpose. That Act empowers the trustees to borrow money, and to raise money by rates for certain purposes specified. One of those purposes is to keep down the interest of

money borrowed ; and they are entitled to raise money either by borrowing or by way of annuity ; but their power of borrowing is limited, for the sum borrowed is not to exceed the sum of 30,000*l*. The Act of Parliament, \*therefore, gives a special power, and that power ought to be strictly followed, and as it authorises them to borrow a certain sum of money, and afterwards, by rates, to pay the interest of the money borrowed, they have no right to borrow beyond the specified amount, or to raise rates to pay interest upon any higher sum. It has been argued that, as the trustees are authorised to raise money by assessments, and that as the payment of interest is not the only purpose to which the money is applicable, the rate is a good rate, and that the intention of the trustees to misapply part of the money, does not render the rate invalid, but only gives the party upon whom the rate is to be levied, a right of appeal or of action, if the money raised should be misappropriated. It appears to me, however, that there is this fallacy in that argument. The vice, instead of being in the disposition or appropriation of the money, is in the original raising of the money ; for the *quantum* of the rate is increased by including in the amount this which I call illegal interest, and therefore the rate is void *in toto*. The trustees had a power to raise 30,000*l*. only, and they would have to pay therefore the interest on that sum, besides certain salaries. Then they would have a right to raise as much more as might be requisite for the payment of these salaries ; but beyond that they have no right to go. There is a material distinction between this case and that of *Rex v. The Mayor and Burgesses of Gloucester*. There, the money to be raised was for the relief and support of the poor. The expence would vary from day to day ; it is necessary in such cases to raise money prospectively, so that there may be always some in hand, in order to meet whatever demands \*may occur. The power of making rates for the poor is not confined to certain limits, but as much money is to be raised as the overseers think fitting and necessary. The objection in that case was, that the parties meant to misapply a part of the money, and it was held that that did not make the rate bad *in toto*, upon the ground that the parties were warranted in raising a sum

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[ \*506 ]

[ \*507 ]

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of money to the full amount of what they did raise. In the present case, on the other hand, the parties were not warranted in raising money to the amount which would be raised by this rate. It is this circumstance which, in my opinion, makes the rate bad *in toto*, and the warrant bad *in toto*. The party upon whom the distress has been levied was liable to contribute only an aliquot part of the sum authorised to be raised by the Act. In this case the plaintiff was rated and distrained upon for more than he was by law liable to pay, and the defendant had no authority so to distrain upon him. There are cases in which it has been held that if, under a warrant of distress, more be claimed of a party than he is liable to pay, the warrant is bad *in toto*. For these reasons, it seems to me that the distress was illegally taken, and that the plaintiff is entitled to the judgment of the Court.

HOLROYD, J. :

[ \*508 ]

I am of opinion that this rate is bad. The cases which have been cited are very different from the present. In *Rex v. The Mayor and Burgesses of Gloucester*, a general power was given to the persons who were to make the rate, to make such a rate as in their judgment they should think fit and proper for the maintenance and relief of the poor. The objects of that \*rate were of necessity all *in prospectu*. It was not intended to pay any monies borrowed, or due, or becoming due. Now the present rate was not for any thing *in prospectu*, but to pay debts already incurred, with respect to monies borrowed either upon interest or annuity, or with respect to monies due to the clergymen or the officers. Those sums were to be paid out of the monies raised or otherwise received under the authority of the Act of Parliament. Now, taking the general purport of the Act as it appears from its enactments, and especially advertng to the words of the thirty-fifth section, it seems to me that these trustees had a power to raise certain monies for the purpose of paying the interest of the original sum which they were authorised under the Act to raise, and likewise of paying the salaries mentioned in the Act; but those were not matters *in prospectu*. The money to be raised was

to be applied to the payment of money already actually borrowed, or then actually due, and therefore could not be for payment of salaries afterwards to become due, and not due at the time of making the rate. These trustees must know that, if they borrow beyond the sums which they are empowered to borrow under the Act of Parliament, they are going beyond the power given them to raise money to be applied to the purposes of the Act, one of which is the repayment of the money there specified. If they raised money by rates beyond the legal amount of the interest of 30,000*l.* as soon as the interest upon that sum is paid, there is a complete end of their power to make rates at all. I think, in this case, the objection is to the rate itself, though it would be otherwise in a poor-rate, where the money is to be raised and expended according to contingencies as they arise.

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BEST, J. :

[ 509 ]

The question raised by the pleadings in this case is neither more nor less than this, viz. whether a party who has a limited authority under an Act of Parliament, may come forward and avow that he has abused the provisions of the Act, and at the same time pray to be protected. It appears that the trustees had a power to raise the sum of 30,000*l.*, and that they have actually raised 32,656*l.* They have made a rate to pay the interest of the larger sum, and the distress in this case issued in order to levy that rate. The plaintiff resists the distress, on the ground that the trustees have wrongfully borrowed 2,656*l.* beyond the sum of 30,000*l.*, which the Act authorises them to borrow, and that this circumstance has made their rate illegal and void ; and the answer to this plea of the plaintiff is, that the rate was expressly made for the purpose of covering such illegal excess ; for it is admitted that the trustees have borrowed more than they were entitled to borrow ; but they say by the pleadings, that at the time of making the assessment, the burial fees were insufficient to answer the purposes of the Act, and that the annuities granted by the Act were in existence ; that it was necessary to raise money by assessments, in order to carry into effect the purposes of the Act, and that the assessments



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[ \*510 ]

were legally made, and were stated so to be made according to the purposes of the Act, and without specifying any purpose for which they were made. The substance of the answer is, that the rate, on the face of it, appears to be for legal purposes, but that it is not made by legal authority; for where the authority is a limited authority, can it be any justification to say that, being empowered to raise only a certain sum, they have in fact levied more? *The King v. The Mayor and \*Burgesses of Gloucester* is distinguishable, because there, the money was properly raised in the first instance. The ground of the decision in that case was, that the money having been properly raised, it was not competent for the Court to quash the rate because the money might be misapplied. But here the money was not properly raised, for it was raised for the purpose of being applied to a purpose not contemplated by the Legislature. But it is said that this should have been made the subject matter of appeal, but if that which has been done, has been done without authority, it is null and void. If the act done by the trustees had been legal, and the money had afterwards been misapplied, that undoubtedly would have been a proper subject for an appeal; for then they would have been justified in raising the money, but not in its application. But here it is distinctly admitted in the pleadings that the first act was illegal. I am therefore of opinion that this rate was not raised for the purposes contemplated by this Act of Parliament, and that the distress which was issued to enforce it was illegal, and that our judgment must be for the plaintiff.

*Judgment for the plaintiff.*

PHILLIPS *v.* BISTOLLI.

1824.

(2 Barn. &amp; Cress. 511—514; S. C. 3 Dowl. &amp; Ry. 822; 2 L. J. K. B. 116.)

[ 511 ]

By the conditions of a sale by auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A., as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid: Held, that it was a question of fact for the jury, whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other.

ASSUMPSIT for goods sold. Plea, non-assumpsit. At the trial before Abbott, Ch. J., at the Middlesex sittings after Hilary Term, 1823, the following appeared to be the facts of the case. The plaintiff was an auctioneer, and in July, 1822, had put up for sale, among several other articles, a pair of ear-rings, the property of a jeweller, described in the catalogue as brilliant top and drop ear-rings; one of the conditions of sale was, that the purchaser should pay 30 per cent. upon being declared the highest bidder, and the residue of the price before the goods were removed. The defendant was a foreigner, and did not fully understand the English language; but he was in the habit of attending the plaintiff's sales, and purchasing goods. On the day in question he attended, and bought several lots, and the ear-rings in question were knocked down to him as the highest bidder, at the price of 88 guineas. They were immediately delivered to him, and he received them without making any objection. After they had been in his hands three or four minutes, a person who interpreted for him said to the plaintiff that the defendant had bid for the lot in question under a mistaken idea that the price at which it was knocked down to him was 48 guineas. The plaintiff said that the last bidding had been mentioned three times. The defendant then returned the ear-rings. The plaintiff, however, refused \*to take them back, but said he would keep them on defendant's account. It appeared further, that if they were Assyrian garnets, they would be worth about 50*l.* only, but if they were rubies, they would be worth the price at which they were knocked down. And it was doubtful, upon the evidence,

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whether they were rubies or garnets. It was objected, on the part of the defendant, that there was no acceptance of the goods by him so as to take the case out of the Statute of Frauds. The LORD CHIEF JUSTICE, however, was of opinion that there was a sufficient acceptance, provided that the defendant was under no mistake when he bid the 88 guineas, and left it to the jury to find whether the defendant was mistaken in the price at the time when he bid the 88 guineas, and the jury having found that there was no mistake, a verdict was entered for the plaintiff. In last Easter Term a rule *nisi* was obtained by *Scarlett* for a new trial, upon the ground that there was no acceptance, inasmuch as the plaintiff had a lien upon the goods until the price was paid, and he could not therefore have intended to part with the possession of the goods. In order to satisfy the Statute of Frauds there must be a delivery by the vendor, with the intention of parting with the possession of the property sold. Now, here it is not to be presumed that the plaintiff intended to part with the possession of the property until the price, or the deposit mentioned in the conditions of sale, was paid. At all events it was, under the circumstances, a question of fact for the jury, whether the delivery was made by the vendor with the intention of parting with the possession, and whether the defendant accepted the goods with the intention of acquiring the right of possession \*as owner : *Chaplin v. Rogers*,† *Blenkinsop v. Clayton*.:

[ \*513 ]

*Gurney and Comyn* now shewed cause :

It is sufficient to satisfy the Statute of Frauds if the defendant for a single moment accepted the goods : *Carter v. Toussaint*.§ Here they must have been delivered by the vendor with the intention of vesting the right of possession in the vendee as owner.

(HOLROYD, J. : Then you say that the vendee would have had a right to take the goods away, although the auctioneer had insisted upon the price being first paid.)

† 6 R. R. 249 (1 East, 192).

§ 24 R. R. 589 (5 B. & Ald. 855 ;

† 18 R. R. 602 (7 Taunt. 597 ; 1 1 Dowl. & Ry. 515).

Moore, 328).

The plaintiff waived his right to the payment of the price or the deposit, by delivering the goods. Here, upon the evidence, it appears at least that the goods were delivered to the defendant as owner, that he received them without objection, and that he kept them in his possession for three or four minutes. There was therefore an acceptance by him as owner during that interval.

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Per CURIAM :

In order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee ; and there must be an actual acceptance by the latter, with an intention of taking to the possession as owner. It lies upon the plaintiff in this case, to make out that there was such delivery and acceptance. Now, here by the printed conditions of sale, a deposit of 30 per cent. was to be paid upon the party being declared the highest bidder, and the residue of the purchase-money when \*the goods were removed ; and it is not to be presumed that the vendor intended, contrary to that condition, to part with the right of possession until the deposit or price was paid. There was, therefore, very slight evidence to shew that the plaintiff intended to part with all control over the goods when he delivered them. Then was there any acceptance by the defendant as owner ? It appears that a very short interval elapsed after the lot was knocked down, before the defendant objected that he had been mistaken in the price. Unless, therefore, the retaining of them for the three or four minutes that intervened, was evidence of an actual acceptance by him as owner, it is clear that there was not any acceptance afterwards. That, at all events, was very slight evidence of an acceptance by the defendant as owner, and it ought at least, under all the circumstances, to be submitted as a question of fact to the jury, whether there was a delivery by the vendor and an actual acceptance by the vendee, intended by both parties to have the effect of transferring the right of possession from the one to the other.

[ \*514 ]

*Rule absolute.*

1824.  
[ 520 ]

CATHERINE MARTHA MELLISH v. WILLIAM  
MELLISH, EDWARD MELLISH, AND THOMAS  
MELLISH.

(2 Barn. & Cress. 520—535; S. C. 3 Dowl. & Ry. 804; 2 L. J. K. B. 45.)

A. being seised in fee of an estate called H., subject to a mortgage for years, by his will, (in which there was a statement in figures of the amount of the estimated value of his entire property, of the sum which his wife had brought him on his marriage, and of the sum which he himself had settled upon his marriage, and of the estimated value of the estate at H.,) directed that his daughter C. M. should have the disposal of the sum which he himself had settled on his wife, and in case she did not dispose of it, that it was to go to certain persons therein named. He then desired that H. should go to his daughter C. M. as follows: in case she married and had a son, to go to that son; in case she had more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she had but one daughter or no child at that time, he desired it might go to his brother W. M. He then gave specific legacies nearly to the amount of the sum which remained, after deducting the money settled on his marriage and the value of the estate at H. And he directed that his daughter should pay an annuity to a person therein named for life; and then he made his brother W. M. his sole legatee: Held, that C. M. took an estate in tail male in H., with a reversion in fee, subject to the other estates created by the will.

THIS case was sent by the LORD CHANCELLOR for the opinion of this Court.

John Mellish being seised to him and his heirs in fee simple of a capital messuage and other hereditaments, situate in the county of Hertford, and known by the general name of Hamels, subject to a mortgage for a term of years, made his will, which was duly executed by him, and of which the following is an exact copy and imitation, both in words and figures: that is to say,

"Marriage settlement, £12,500 C. P.		£120,000
Do.	25,000 J. M.	
		<hr/>
		120,000
	37,500	80,000
Hamels	43,000	<hr/>
		40,000
	80,500	<hr/>

[ 521 ]

Catherine Mellish to have the disposal of the 25/m.; in case she does not dispose of it, I wish it to go to as follows: 5/16 W. M., 5/16 E. M., 3/16 T. M., 3/16 A. G. "The mortgage on Hamels to be paid off as soon as William Mellish can do it without

prejudice to the business. Hamels to go to my daughter Catherine Mellish as follows: in case she marries and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother William Mellish.

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* C. H. M.	£5,000	(£3,000.
W. M.	10,000	* These initials
E. M.	7,000	mean my daughter,
A. G.	5,000	my three brothers,
J. M.	5,000	and my sister.
	<hr/>	
	30,000	

- \* £500 J. L. Bonhote.  
 200 Dessoulary.  
 200 Mouchet.  
 40 £40. Bentley, Miss S. Salmon £200.  
 50 J. Bonhote.  
 20 Macdonald.

1,010

I give as follows: /

\* I desire that one thousand pounds of the three thousand pounds left her may be paid to my daughter, immediately on my decease.

Mrs. Pinfold to receive 200*l.* a year from Catherine Mellish, during the life of Mrs. Pinfold; a year's wages to all my household servants, and likewise to Webster, and I desire mourning may be given to all my servants, the same as at my dear wife C. M.'s death. I leave my dear brothers W. M., E. M., and J. M., my sole executors and guardians of my child Catherine Mellish, and I leave my brother, William Mellish, my sole legatee."

The testator departed this life on or about the 9th day of the month of April, 1798, without having revoked \*or altered his said will, leaving the said Catherine Martha Mellish, in the said will called Catherine Mellish, the plaintiff, his only child, and heir at law. The question was, what estate and interest the said Catherine Martha Mellish took in Hamels.

[ \*522 ]

*Preston* for the plaintiff:

Catherine Mellish took, under the will, an estate in tail male in Hamels. This construction will best answer the general intention of the testator; any other construction would place this property in a line of enjoyment contrary to his will. The first object of the testator's bounty is his own daughter. In

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[ \*523 ]

contemplating her marriage he also provides for a son of the daughter ; he does not name that son as an individual, but as a class, the word " son " being descriptive of all the male line. If the daughter take only an estate for life, it would follow as a consequence, that if she had one son and several daughters, and, during her life, the son died, leaving a son, the grandson would be excluded by a daughter ; and if the inheritance be suspended until her death, and is to vest only at that period, and she left a grandson and no son, then the grandson could not take ; and if there be more than one daughter, at her husband's death, or her own death, and no son, the property would go to the eldest daughter, in exclusion of a grandson ; and if there be only one daughter, and no son at that period, the estate would go to William Mellish. Therefore, if Catherine Mellish had several daughters, and one son, and he had a son, and died in his mother's life-time, the eldest of the daughters would take in preference to the grandson ; and if Catherine Mellish had, at her death, only one daughter, but a grandson, descending from a son, William Mellish would \*take, and the grandson be excluded. Such an intention is not to be imputed to the testator, unless the Court are, by the express language of the will, compelled to give that effect to the will. It may be laid down as a general rule, that where a man devises to A. an estate for life, with remainder to his son or sons, then in favour of the intention of the deviser, (unless it be clear from the language of the will that the son is to take *eo nomine*, as purchaser) the word " son " or " sons " will be construed collectively and as descriptive of all the male descendants, as a class, and the devise will give to A. an estate of inheritance in tail male. Catherine Mellish, the parent, does not take an estate in fee. From the peculiarity of the language of the will, her daughter might take as purchaser, because the general intention will not allow the parent to take an estate in tail female. Sons, however, and more remote descendants, being males descended from males, will take through the medium of being the heirs and descendants of Catherine Mellish, their parent. But what difficulty is there in deciding that the daughter of Catherine Mellish may take as purchaser, although the sons are to take by descent, through the medium of their parent. In

*Wight v. Leigh*† the devise was to A. and after his death to his first and other sons, and in default of male issue, then to his eldest and other daughters, and to their heirs male for ever, and it was held that A. took an estate in tail male. In *Wharton v. Gresham*‡ the testator devised all his estates, as well real as personal, to his nephew Anthony Wharton, and to his sons in tail male; and for want of such issue male to his brother captain John \*Wharton, and to his sons in tail male, and in failure of such issue male, then to his right heirs. It was held that J. Wharton took an estate tail. The word “sons” was construed as a collective term, giving by that word the inheritance to the first or immediate devisee. In *Chorlton v. Craven*§ the devise was to Thomas Chorlton during his life, with remainder to his first son in tail male lawfully begotten, severally and successively, (not saying to the second, third, fourth, and other sons), and for want of such issue either of his son T. C. and his son J. C., then he devised the estate to his daughters and their children, share and share alike, to be held to them and their heirs for ever, as tenants in common, and not as joint tenants. It was held that Thomas was tenant in tail. This case was so decided by the Court of King’s Bench on a case sent from the Court of Chancery, and the certificate of the King’s Bench was confirmed by the LORD CHANCELLOR. The Court of Exchequer, in Trinity Term, 1823, on the same will came to the same decision, and in each case the decree was against a purchaser. There is another class of cases which establish that the word “son” may include all the descendants. In *Sonday’s case*,|| Sonday devised a certain house to his wife for life, and, after her decease, his son William to have it; and if his son William married, and had by his wife any male issue, lawfully begotten of his body, then his son to have it; if he had no male issue lawfully begotten of his body, then his son Samuel to have the house; if Samuel married, and had issue male of his body lawfully begotten, then his son to have the house after his decease; if no \*issue male, then his son Thomas to have the house; if Thomas married, having a male issue of his body lawfully begotten, then his son to have the house after his decease;

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[ \*524 ]

[ \*525 ]

† 10 R. B. 120 (15 Ves. 561).

‡ 2 Bl. Rep. 1083.

§ Not reported.

|| 9 Co. Rep. 127.



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if he had no issue male, than to his son Richard in like manner, *totidem verbis*, and so to Daniel *totidem verbis*; and then he added this clause, “if any of his sons or their heirs male, issue of their bodies, went about to alien or mortgage the house, then the next heir to enter.” It was resolved that an estate in tail male was created for three reasons, first, because the testator says, “if he hath no issue male, his next son to have it,” which was as much as to say, “if William dies without issue male,” which words were sufficient to create an estate tail in him. Secondly, the last clause, “if any of his sons or their heirs male, issue of their bodies, go about,” &c., which explains the first words, that the male shall be heir and take by descent. Thirdly, the thing prohibited proved it; for if the sons only took an estate for life, this restraint would have been idle. In *Wyld v. Lewis*,† the testator devised to his wife Elizabeth all his lands, &c., not settled in jointure. The devise was general; and then the testator said, “if it shall happen that my wife shall have no son or daughter by me begotten on the body of the said Elizabeth, and for want of such issue, then the said premises to return to my brother John Wyld, if he shall be then living, and his heirs for ever, only paying to his two brothers (A. and B.) the sum of 150*l.* within one year after the decease of the said Elizabeth;” and it was held, that the wife took an estate tail; and in that case the Lord CHANCELLOR observed, that the inclination to avoid the \*absurdity of excluding the grandchildren had been the principal reason for construing words of the singular number, and which are properly descriptive of particular persons only, in a collective sense, as including the descendants of the first taker. Also in *Robinson v. Robinson*,‡ the devise was to A. B. for his life and no longer, and after his decease, to such son as he should have, lawfully to be begotten, taking the name of Robinson, and in default of such issue, then to the testator’s cousin and his heirs for ever; and it was held by the Court of King’s Bench, and afterwards in the House of Lords, that A. B. took an estate tail. The effect of that decision was, that the words “son lawfully to be begotten,” was a collective term, and included all the descendants in the male line. It therefore described all descendants of the

[ \*526 ]

† 1 Atk. 432.

‡ 1 Burr. 38.

person to whom the gift was originally made. If the word "son" be *nomen collectivum*, as taking in the whole class, it is a word of limitation, and not a word of purchase.† These authorities shew that Miss Mellish took an estate in tail male, since otherwise the gift would be so narrowed as to produce great inconveniences; for if she took merely for life, her husband would be excluded from all benefit, though she died leaving a son. And if she died, leaving a grandson only, that grandson would be excluded by a daughter, so that a daughter would take in exclusion of a male descended from a male, and William Mellish might take, though there was a grandson at the death of Miss Mellish, because no son was living when that event took place, while the intention clearly was, that if there should be \*a male descendant, he and his male descendants should take in exclusion of a daughter, and that William Mellish should not take as against a son or more remote male descendant of Miss Mellish, or the eldest of two or more daughters, if there should be several daughters.

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*Tindal, contra :*

The fee either descended to Catherine Mellish, or it was devised to her by the will defeasible in three events; the first was, if she married and had a son, it was then to go to that son; secondly, if she had more than one daughter and no son, it then was to go to the eldest daughter; and, thirdly, if she had no child at all, it was to go to William Mellish, the testator's brother. These are executory devises, to take effect according to the rules applicable to that subject; and so that William Mellish might be entitled to the estate in fee. It may be conceded, that at the present time, and before the happening of any of these events, the fee is vested by descent in Catherine Mellish; for, whether the beneficial interest is to be given to her for life, with contingent remainders to the son, daughter, and William Mellish, in succession, or whether it is intended to be given her in fee with executory devises; in either case the fee is, in the meantime, in Catherine Mellish; for it is a general rule, that where a remainder of inheritance is limited in contingency by devise, the inheritance, in the meantime, if not

† See Lord THURLOW's reasoning in *Jones v. Morgan*, 1 Br. C. C. 219.

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otherwise disposed of, remains in the heirs of the testator, until the contingency happens to take it out of them: *Fearne*, 351. Therefore, if Catherine Mellish took an estate for life, with contingent remainders to her son, &c., the fee would be in her until the contingency happened. The question will be, \*whether the testator has given her a particular estate, different from the fee which has descended to her, with contingent remainders, or whether the limitations to the son, daughter, and William Mellish are executory devises in defeasance of the fee simple which has come to her either by descent or by the devise. Now the latter is most consistent with the general intention expressed by the testator. No intention is manifested by him to divide the fee simple into particular estates and remainders. It is not given to her for life or in tail, but the terms used are, "Hamels is to go to Catherine Mellish." That implies that it is to go as an inheritance at law; that the whole of the estate and not a part of it is to go. The very circumstance of the annuity being made chargeable on Catherine Mellish immediately, shews that that must have been the intention, for otherwise she might have sustained a loss by reason of the annuity: *Com. Dig. tit. Devise, (N.) 4. Lee v. Withers,† Andrew v. Southhouse*! are authorities upon this point. Besides, it appears from other parts of the will, that when the testator used the words 'to go,' he meant the entire interest. For in the early part of his will he directs that Catherine Mellish shall have the disposal of the 25,000*l.*; and in case she does not dispose of it, it is to go to other persons in certain proportions therein mentioned; and it appears also, from the preceding part of the will, when he used the word "Hamels," he meant the estate of inheritance which he had in Hamels; for in estimating the value of all his property, he placed against the word "Hamels" the figures 43,000*l.* It is clear, therefore,

[ \*529 ] that in the subsequent part of the will, \*when he used the same term "Hamels," he meant that entire interest in Hamels which he estimated to be of the value of 43,000*l.*; viz. the estate of inheritance. The testator appears, in the early part of his will, to have estimated the value of his whole property at 120,000*l.*;

† Sir T. Jones, 107.

† 5 T. B. 292.

and he bequeaths in specific legacies nearly the whole of the 40,000*l.*, which was the sum that remained, after deducting the estimated value of Hamels, and the amount of the money settled upon his marriage, from the entire value of his property. It is clear, that if he had in terms devised the estate in Hamels, or all his interest in Hamels, that would have carried the fee; and if it can be shewn, therefore, that by the word "Hamels" he meant his whole interest in it, then the whole of that interest will pass as well as if he had used the term. Now, although where the will leaves it in doubt, whether the devise is to operate as a contingent remainder or an executory devise, the Court will construe it to be a contingent remainder; yet here, the question is not whether contingent remainders shall be construed as executory devises, but whether the Court will give Catherine Mellish, by implication, particular estates, for the purpose of supporting these contingent remainders, the effect of which would enable her to defeat the testator's general intention. Now there is no case which goes to that extent. In *Walter v. Drew*,† if the devise to Richard had been construed an executory devise, it would have been after general failure of William's issue, and would have been too remote; and therefore an estate tail was given to the eldest son by implication. The same observation applies to *Wealthy v. Bosville*.‡ The fee, therefore, either goes to Catherine Mellish by descent, \*or she takes it by purchase; and it is immaterial whether she take it by one medium or the other. The first event by which the fee given to Catherine Mellish is to be defeated, is in case she marry and has a son. Now the estate is not given expressly to Catherine Mellish for life, which would have been done if it had been intended that she should take that estate only; and there is a material distinction between the devise to the son and to the daughter. The latter is to take only at the death of her mother or her father, which shall first happen; but the former is to take immediately; for it is not necessary that he should be living at the time of her death. It is evident that the testator thought that he had given his daughter a sufficient provision for any one female; for in case Catherine Mellish should leave

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[ \*530 ]

† Com. Rep. 372.

‡ Rep. temp. Hardw. 258.

MELLISH only one daughter, he gives the estate, not to that one daughter, but to William Mellish. Now it was quite as unreasonable to prefer his brother to his one granddaughter as to prefer his grandson to his daughter. Suppose Catherine Mellish married early, and had a son, and then lived to the age of eighty, why should the grandson wait till he attained the age of fifty or sixty before he takes and not take immediately, whilst his mother has such ample provision.

(BAYLEY, J. : Suppose Catherine Mellish had had a son who lived only two days, and then died, and then that she had another son born, would that son take? If he did he must take as a purchaser, for he could not derive title from the first son.)

That is a very nice supposition, and not likely to have occurred to the testator. The testator was contemplating the founding of a family, and he was desirous to have a male relation to succeed him, and he prefers a son before his granddaughter or his daughter.

[ \*531 ] (BAYLEY, J. : Your argument would have this effect: if Catherine Mellish had ten daughters, and each of them left children, but died before the mother, their issue would not take.)

If she has more than one daughter, at her own or her husband's death, it is to go to the eldest daughter; but if none, it is to go to the testator's brother. The testator has so framed the devise that the children would take the personal property, but the real estate goes to the person whom he wished to represent his family.

(BAYLEY, J. : Suppose the eldest daughter of Catherine Mellish to have children, and a second, third, and fourth daughter, and that the eldest daughter, in the lifetime of the mother, dies, leaving children, and that the second daughter, in the lifetime of the husband, dies, leaving children, and that at the death of Catherine Mellish she has still two daughters living, who would take the estate?)

The only question is, which construction most nearly satisfies the intention of the testator. As to "son" being *nomen collec-*

*tivum*, the case of *Wight v. Lee* is distinguishable, because there, the words “in default of issue” were introduced. The same observation applies to *Wharton v. Gresham*.† As to the case of *Chorlton v. Craven*, there were the words “severally and successively,” which distinguish it from this case. In *Lovelace v. Lovelace*,‡ it was held that a devise to one, and his eldest issue male, passed an estate for life only, but that a devise to one and his issue generally passed an estate tail.§

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(BAYLEY, J.: In *Perrot's* case|| it is said that the lands mentioned in *Lovelace v. Lovelace* were gavelkind.)

*Preston*, in reply :

[ 532 ]

The heir-at-law cannot be disinherited, unless there be words in the particular instrument to pass the estate from him. Nothing can be inferred from the direction that the mortgage was to be paid off. William Mellish was liable, and directed to pay it in his character of residuary legatee; and the annuity is not charged on the real estate, and therefore would be payable out of the personalty. It is clear, as a rule of law, that the gift cannot be construed as an executory devise if it can operate in any other mode. Now it is said, that the gift is to Catherine Mellish in fee, defeasible in three events; but if that be the effect of the will, what becomes of the husband. If the fee be determined by the executory devise, the courtesy will fail with it, and that is inconsistent with the will; because the will supposes that the husband of Catherine Mellish is to have some interest, in the event, at least, of there not being any son; for the estate is to go to the eldest daughter either on the death of the husband or of the mother. It has been argued, that on the death of Catherine Mellish, if she should have a son, a son would take immediately. A daughter could take only if there was not any son, and if there were several daughters, the eldest daughter could take only a life-interest for want of words of inheritance. If Catherine Mellish had one son by her first husband, the son, if he took the fee immediately on his birth,

† 2 Bl. 1083.

‡ Cro. Eliz. 40.

§ Robinson on Gavelkind, 37.

|| Moore, 368.

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[ \*533 ]

would become the first purchaser and an ancestor; and if he died without issue, and there should be a second son of the half blood, that son could not take because the fee had vested by purchase in the first son; so that if the first son died without issue, leaving a sister of the whole blood, and a brother of the half blood, it is clear that \*the second son of Catherine Mellish would be excluded. Suppose again, Catherine Mellish to die leaving grandsons, they would not take unless she herself took an estate in tail male. Now, could it have been the intention of the testator to prefer his brother, if there were any male heirs descended from his daughter. It is absurd to suppose that the descendants of Miss Mellish are to be excluded, merely because there might not be any son living at her death. This is incompatible with the intention of the testator, and the scope of his will; were several daughters to exist, and all the daughters to die during Miss Mellish's life-time, but to have left issue, could it be reasonably concluded that that issue of the eldest daughter could not take any benefit? The testator's intention clearly was, to prefer all the descendants of his eldest granddaughter to William Mellish. He otherwise would not have introduced words shewing a preference of the eldest female as an heiress before his brother. *Bifield's* case was the earliest decision on which the word "son" was construed as a collective term.

BAYLEY, J. :

[ \*534 ]

It may be collected from the authorities, that if the word "son" be used not as a *designatio personæ*, but with a view to the whole class, or as comprising the whole of the male descendants severally and successively, then it is the manifest intention of the testator to give an estate tail; and it is equally clear, that words are not to operate by way of executory devise, which are capable of operating in any other way. In this case the words are, "Hamels to go to my daughter Catherine Mellish as follows, viz. in case she marry and has a son, then it is to go to that son." Now, if the \*word "son" be used as a *nomen collectivum*, it would give to Catherine Mellish an estate to continue so long as there should be any male descendants of Catherine Mellish, and that would be an estate in tail male. I

cannot find in the subsequent part of this will, any thing inconsistent with the construction that ought to be put upon it if it had stopped here. We shall not, however, give our decision at present.

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HOLBOYD, J. :

It appears to me that the word "son" in this will, should be read "any son." In the first place, the estate is to go to the daughter in a particular mode; for it is to go to his daughter "as follows," and he then describes the mode in which it is to go, that is, that a son should have it if Catherine Mellish marry and have a son; and he is then describing in what way the daughter shall have it, and supposing her son be to have the estate, he could only take it in that case by descent, unless the will operated as a gift to the daughter, and not only to the daughter, but subsequently as a gift to that son and another son, so as to be doing away with the life estate of the daughter. The words are, "in case she marry and has a son, to go to that son; in case she has more than one daughter at her or her husband's death, to go to the eldest daughter." Now, if the word "son" be construed to mean not an immediate descendant, but any son, whether immediate or remote, such as a grandson, then all difficulty seems to be removed; for, according to that construction, the limitation over to the eldest daughter would not take effect, even although the immediate son were dead, if there were a grandson living, or a great grandson, so that the male descendants of his daughter would not be excluded; but if the word "son" be confined to the immediate son, the consequence would be, that if that son died leaving sons, the estate would go over to the daughters.

[ \*535 ]

The following Certificate was afterwards sent :

"This case has been argued before us, and we are of opinion that Catherine Mellish took an estate in tail male with a reversion in fee, subject to other estates created by this will.

"J. BAYLEY.

"G. S. HOLROYD.

"W. D. BEST."



1824.  
Jan. 28.

# K. B. HILARY TERM.

[ 540 ]

## HAWES AND ANOTHER v. WATSON AND ANOTHER.†

(2 Barn. & Cress. 540—546; S. C. 4 Dowl. & Ry. 22; 2 L. J. K. B. 83; S. C. at Nisi Prius, Ryan & Moody, 6.)

A., by contract, sold to B. a quantity of tallow, then lying at a wharf, at so much per cwt.; and on the same day gave a written order upon the wharfingers to weigh, deliver, transfer, and re-house the same. B. having entered into a contract to sell tallow to C., obtained from the wharfingers and gave to C. a written acknowledgment that they had transferred the tallow to the account of C., and that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order: Held, in an action of trover by C. against the wharfingers, that after their acknowledgment, they held the tallow as the agents of C., and that they could not therefore set up as a defence a right in A. to stop it in *transitu*.

TROVER for a quantity of tallow. Plea, not guilty. At the trial before Abbott, Ch. J., at the London sittings after Michaelmas Term, the following facts were proved for the plaintiffs. The plaintiffs, on the 25th September, 1823, purchased by contract, of Messrs. Moberly and Bell, 300 casks of tallow, at 40s. per cwt. On the 27th September, in part execution of their contract, Moberly and Bell sent to the plaintiffs the following transfer note, signed by the defendants, who were wharfingers. "Messrs. J. and B. Hawes, we have this day transferred to your account, (by virtue of an order from Messrs. Moberly and Bell) 100 casks tallow, ex *Matilda*, with charges from October 10th, 1823. H. and M. 100 casks." The plaintiffs then gave Moberly and Bell their acceptance for 2,880*l.*, the price of the tallow, which was duly paid, and afterwards sold 21 casks of this tallow, which the defendants delivered, pursuant to their order. Moberly and Bell stopped payment on the 11th October, and on the 14th the defendants \*received notice from Raikes & Co., the original vendors of the tallow, not to deliver the remaining casks to Moberly and Bell, or their order; and the defendants, in consequence, refused to deliver the remainder of the tallow to the

[ \*541 ]

† Cited and followed in the judgments of the Lords Justices of Appeal in *Henderson v. Williams* (19 Dec.

1894) '95, 1 Q. B. 521; 64 L. J. Q. B. 308, where intermediate cases are cited and discussed.—R. C.

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plaintiffs, upon their demanding the same. On the part of the defendants it was proved, that Moberly and Bell, on the 26th September, had purchased of Raikes & Co. 100 casks of tallow (the same that were afterwards sold to the plaintiffs) landed out of the *Matilda*, lying at Watson's wharf, at 2*l.* 1*s.* per cwt., to be paid for in money, allowing 2½ per cent. discount, and fourteen days for delivery; and on the same day Raikes & Co. gave a written order upon the defendants to weigh, deliver, transfer, or rehouse the tallow. Moberly and Bell had not paid for the same, nor had it been weighed subsequently to this order. Upon these facts it was contended at the trial, on the part of the defendants, that they were not bound to deliver to the plaintiffs the remaining 79 casks of tallow, inasmuch as Raikes & Co. had, as between them and Moberly and Bell a right to stop them *in transitu*, the delivery to Moberly and Bell not being perfect, inasmuch as the tallow had not been weighed. The LORD CHIEF JUSTICE, however, was of opinion, that whatever the question might be as between buyer and seller, the defendants having, by their note of the 27th September, acknowledged that they held the tallow on account of the plaintiffs, could not now dispute their title; and the plaintiffs had a verdict.

The *Attorney-General* now moved for a new trial, upon the ground taken at the trial. *Hanson v. Meyer*† \*is an authority to shew, that the absolute property in the tallow would not vest in Moberly and Bell, the first vendee, until it was weighed. The contract in that case was in terms similar to the contract made between the original vendors and Moberly and Bell. The weighing must precede the delivery, in order that the price may be ascertained. In that case, too, part of the goods had been weighed and delivered, yet it was held, that the vendor might retain the remainder, which continued unweighed in his possession; and *Shepley v. Davis*‡ is also an authority to the same effect.

[ \*542 ]

ABBOTT, Ch. J. :

The plaintiffs, in this case, paid their money upon the faith of the transfer note, signed by the defendants, by which they

† 8 R. R. 572 (6 East, 614; 2 Smith,

‡ 15 R. R. 598 (5 Taunt. 617; 1 Marsh. 252).

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acknowledged that they held the tallow as their agents. If we were now to hold, that, notwithstanding that acknowledgment and that payment, the plaintiffs are not entitled to recover, we should enable the defendants to cause an innocent man to lose his money. To hold that the doctrine of stoppage *in transitu* applied to such a case as the present, would have the effect of putting an end to a very large portion of the commerce of the city of London.

BAYLEY, J. :

[ \*543 ]

This appears to me very different from the ordinary case of vendor and vendee. In such cases, justice requires that the vendee shall not have the goods unless he pays the price. If he cannot pay the price, the vendor ought to have his goods back ; but if the question arises, not between the original vendor and the original vendee, but between the original vendor and a purchaser from the vendee, that purchaser having paid \*the full price for the goods, what is the honesty and justice and equity of the case? Surely, that the vendee, who has paid the price, shall be entitled to the possession of the goods. I am of opinion, that when Messrs. Raikes & Co. signed the order to transfer, weigh, and deliver, that, according to the settled course and usage of trade, enabled Moberly and Bell to sell the goods again. There are many cases in which it has been held, that if the first vendor does any thing which can be considered as sanctioning the sale by his vendee, that destroys all right of the former to stop *in transitu* : *Stoveld v. Hughes*,† *Harman v. Anderson*.‡

HOLROYD, J. :

I think that the note given by the defendants makes an end of the present question. When that note was given, the tallow became the property of the plaintiffs, and is to be considered from that time as kept by the defendants as the agents of the plaintiffs, and the latter were to be liable from the 10th October for all charges. This case is very different from that of *Hanson v. Meyer*. There, there was a sale of all the vendor's starch, (the quantity not being ascertained,) at 6*l.* per cwt. The order

† 12 R. R. 523 (14 East, 308).

‡ 11 R. R. 706 (2 Camp. 243).

was to weigh and deliver all the vendor's starch, and a part having been weighed and delivered, but not the residue, the main question before the Court was, whether the weighing and delivery of part did or did not in point of law operate as a transfer of the property as to the whole. The Court held, rightly, that it did not, because there the price of the whole which was to be paid for by bills could not be ascertained before it was weighed. The delivery of part, therefore, was not a delivery of the whole, \*but the order was complied with only as to the part which was weighed and delivered, and the property in the residue remained unchanged until something further was done. It was not a delivery of part for the whole, and therefore it did not operate in law as a delivery of the whole so as to divest the vendor of his right to stop *in transitu*; but here, the wharfingers upon the receipt of the order directing them to weigh and deliver, sent an acknowledgment that they, the wharfingers, had transferred the goods to the vendees, and that they would be considered as subject to charges from a certain period. I think, therefore, that the wharfinger then held the tallow as the goods of the plaintiffs and as their agents, although there was not any actual weighing of them; and that the plaintiffs were then in possession by the defendants as their agents, they having acknowledged themselves as such by their note. For these reasons I am of opinion that the plaintiffs are entitled to recover.

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[ \*544 ]

BEST, J. :

I am also of opinion, that the acknowledgment which has been given in evidence puts an end to all question in this case. The very point has already been decided in the case of *Harman v. Anderson*.† There the wharfinger had transferred the goods to the name of the vendee, and actually debited him with warehouse rent, but he having become insolvent, the sellers gave notice to the wharfingers to retain the goods; and upon an action of trover being brought against the wharfingers by the assignees of the vendee, it was contended that the sellers' right to stop *in transitu* continued; \*but Lord ELLENBOROUGH said, "that the goods having

[ \*545 ]

† 11 R. B. 706 (2 Camp. 243).

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the best established principles, still to allow a stoppage *in transitu*. From that moment the defendants became trustees for the purchaser, and there was an executed delivery, as much as if the goods had been delivered into his own hands. The payment of rent in these cases is a circumstance to show on whose account the goods are held; but it is immaterial here; the transfer in the books being of itself decisive." In the ensuing term, the then *Attorney-General* (afterwards Lord Chief Justice GIBBS) expressed his acquiescence in the decision at *Nisi Prius*. In that case, indeed, it does not appear that, in order to ascertain the price, it was necessary to weigh the goods, but in a subsequent case of *Stonard v. Dunkin*,† it was expressly held by Lord ELLENBOROUGH, that a warehouseman, who, on receiving an order from the seller of malt, to hold it on account of the purchaser, gave a written acknowledgment that he so held it, could not set up as a defence for not delivering it to the purchaser, that by the usage of trade, the property in malt sold was not transferred till it was re-measured, and that before the malt in question was re-measured, the seller became bankrupt; and there Lord ELLENBOROUGH says, "whatever the rule may be between the buyer and seller, it is clear the defendants cannot say to the plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing, they attorned to him." It appears to me, too, that if we consider the principle upon which the right of stoppage *in transitu* is founded, it cannot extend to \*such a case as the present. The vendee has the legal right to the goods the moment the contract is executed, but there still exists in the vendor an equitable right to stop them *in transitu*, which he may exercise at any time before the goods get actually into the possession of the vendee, provided the exercise of that right does not interfere with the rights of third persons.‡ Now, it appears to me impossible, that it can be exercised in this case without disturbing the rights of third persons, for the property has not only been transferred to the purchaser in the books of the wharfingers, but there has been an acknowledgment by them,

[ \*546 ]

† 11 R. R. 724 (2 Camp. 344).

‡ This passage of the judgment is cited by JAMES, L.J., in *Ex parte*

*Golding* (1880) 13 Ch. Div. 628, 634.—R. C.

that they hold it for the purchaser, who has paid the price of it. It has been said that there has been no change of property. If there has not, I do not see how there can be any until the tallow is actually melted down and converted into candles. If the argument on the part of the defendants be valid, the vendor, if he is not fully paid, has a right if the goods are not weighed, to stop *in transitu*, even though they have passed through the hands of a hundred different purchasers and been paid for by all except the first. It appears to me, that we should disturb an established principle if we held that this could be done in such a case as the present. I think the right of stoppage *in transitu* is an equitable right to be exercised by the vendor, only when it can be done without disturbing the rights of third persons.† Here, that cannot be done, and therefore I think that Raikes & Co. had not any right to stop *in transitu*, and that the plaintiffs are therefore entitled to recover.

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*Rule discharged.*

### JEE, CLERK, v. THURLOW.

(2 Barn. & Cress. 547—555; S. C. 4 Dowl. & Ry. 11; 2 L. J. K. B. 81.)

1824.  
Jan. 27.  
[ 547 ]

By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds: Held, that this deed was legal and binding, and that a plea by the husband, that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce *à mensâ et toro* was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity.‡

DEBT on an indenture, made between defendant of the first part, his wife of the second part, and plaintiff, a trustee for the wife, of the third part, whereby, (after reciting that certain differences had then lately arisen and taken place between defendant and his wife, and that they had mutually agreed to live

† See *Cuming v. Brown*, 9 R. R. 792, 809; 54 L. J. Q. B. 33; and in 603 (9 East, 506; 1 Camp. 104). *Sweet v. Sweet* (31 Oct. 1894) '95,

‡ Followed in *Fearn v. Lord* 1 Q. B. 12; 64 L. J. Q. B. 108.—*Aylesford* (1884) 14 Q. B. Div. R. C.

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separate and apart,) defendant covenanted to pay his wife, during so much of her natural life as he should live, an annuity of 80*l.* a year. Breach, non-payment of one quarter's annuity. Plea first, cravedoyer of the deed, whereby it appeared that defendant covenanted not to sue his wife for restitution of conjugal rights, and that she agreed to accept the said annuity for her support, to leave their children under the sole control of defendant, without any interference by her, and that if defendant paid any debts for her, he should be at liberty to deduct the amount out of the annuity. And plaintiff, on behalf of the wife, covenanted that she should release and give up all claim of jointure, dower, or thirds, and that he would indemnify defendant against all her debts. The plea then averred, that after the making of the indenture, the wife instituted, in the Consistory Court of the Lord Bishop of London, a cause against defendant for the restitution of conjugal rights; in which cause defendant caused to be given in, and admitted an allegation and exhibits, charging his wife with certain acts of adultery; and that \*such proceedings were thereupon had in the Consistory Court in the said cause, that by a decree of that Court, made in the said cause, defendant and his wife were divorced from bed and board; and concluded with a verification. Demurrer and joinder.

[ \*548 ]

*Chitty*, in support of the demurrer :

The plea in this case is certainly bad. In the first place, the covenant is absolute to pay during the life of the defendant, and is not qualified to pay, only so long as the parties should live separate, or as long as the wife should continue chaste. It will perhaps be urged that this is analogous to a demand of dower, which is forfeited by adultery, and that this action is barred by the decree of the Ecclesiastical Court. But dower is, under such circumstances, forfeited by the express words of an Act of Parliament.† Nor can the decree alluded to be well pleaded as a bar in this Court. In *Sidney v. Sidney*,‡ it was held that adultery was no bar to a claim of the specific performance of marriage articles; and in *Field v. Serres*,§ the Court of C. P. refused to

† Westm. 2, c. 34.

‡ 3 P. Wms. 269.

§ 1 Bos. & P. (N. R.) 121.

allow the defendant, in such an action as the present, to withdraw the general issue and plead the adultery of the wife, because it would not be an answer to the action. The principal question is, whether such deeds as the present can be in any event supported. With the exception of *Durant v. Titley*,† there is no case upon which an argument against them can be founded; and although the present LORD CHANCELLOR, in *St. John v. St. John*,‡ has said that, if it were *res integra*, the question would \*be worthy of great consideration, yet he has upheld the former decisions. Such were *Lord Rodney v. Chambers*§ and *Guth v. Guth*.|| In *Worrall v. Jacob*,¶ Sir W. GRANT, then Master of the Rolls, treated it as settled law, that such deeds were valid; and in *Stuart v. Kirkwall*†† effect was given to such an arrangement; for it was there held that a married woman, separated from her husband, and having a separate maintenance, might render that liable by accepting a bill of exchange. The reasons for the judgment in *Durant v. Titley* do not appear; but that case is essentially different from the present, inasmuch as the deed provided for the future separation of the husband and wife, at the mere discretion of the latter, without requiring the consent or approbation of trustees, as in *Lord Rodney v. Chambers*.

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[ \*549 ]

*Patteson, contra* :

The plea is a sufficient answer to the action. By the deed, as set out on oyer, it appears that the defendant covenanted not to sue his wife for restitution of conjugal rights. It is true, that the wife did not expressly enter into any such covenant; but her covenant to leave the children under his sole management is in effect the same, for she cannot sue for restitution of conjugal rights without breaking that covenant. She, therefore, by proceeding in the Ecclesiastical Court, took the first step towards destroying the deed. This must be considered as an action by the wife; any matter of defence against the cestui que trust is also a defence against the trustee. Had the wife succeeded in that \*suit, the deed would have been vacated; and she would

[ \*550 ]

† 21 R. R. 773 (7 Price, 577).

‡ 11 Ves. 526.

§ 2 East, 283.

|| 3 Br. C. C. 614.

¶ 3 Mer. 256.

†† 3 Madd. 387.



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have succeeded but for the allegation of adultery there set up as a defence. Now it would be somewhat singular if the situation of the wife were to be better in this Court, on account of a charge of adultery having been proved against her in another. That a deed of separation is at an end if the parties come together again, is proved by *Bateman v. Ross*,† *St. John v. St. John*,‡ and *Fletcher v. Fletcher*.§ *Gawden v. Draper*,|| which at first sight appears to warrant a different opinion, turned entirely upon the pleadings.

(BAYLEY, J.: Nothing appears on the record which can warrant this Court in saying that adultery has been committed. The Ecclesiastical Courts proceed upon evidence of which we cannot take notice.)

It has certainly been held, that adultery would not be a good plea to such an action as the present, but this plea goes further, and shews a judgment on the point by a court of competent jurisdiction. But, whether the plea be good or bad, the action cannot be maintained, for the deed itself is illegal and void. Several cases have been cited, in which the validity of deeds of separation was recognised; but many high authorities have expressed great doubts upon the subject, and have shaken the former decisions: *St. John v. St. John*, *Mildmay v. Mildmay*.¶ In *Durant v. Titley* it was held, that deeds providing for future separation were void, and it would not be difficult to shew, that all the arguments apply equally to provisions for present separation. It would, however, be useless to enter upon a discussion of that point, unless the Court \*feel themselves at liberty to decide in favour of this defendant, notwithstanding the cases in the books, if they shall be satisfied of the impolicy and impropriety of such contracts.

[ \*551 ]

ABBOTT, Ch. J.:

The Judges who decided the case of *Durant v. Titley* did not intend to shake any former decision. They thought it different

† 14 R. R. 55 (1 Dow, 235).

|| 2 Ventr. 217.

‡ 11 Ves. 526, 537.

¶ 1 Vern. 53.

§ 2 Cox, 99; S. C. 3 Br. C. C. 618, n.

from all the former cases, inasmuch as the deed provided for future separations of the husband and wife, who, at the time of making the deed, were living together. For a long series of years, all the Judges, when called upon to pronounce judgment in such cases, have felt themselves bound by former decisions, although each of them in his turn has said, that his opinion would probably have been different, had the question been *res integra*. In *St. John v. St. John*, the LORD CHANCELLOR says, "If this were *res integra* untouched by dictum or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this Court. But if dicta have followed dicta, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled law upon the subject." That opinion is a fit guide for us. Ought not we to say, that if a new decision is to overturn all the former cases on this question, it must be the decision of that high tribunal which is competent to give the law to all other tribunals, and rectify their errors, whenever called upon to review them. For these reasons, I cannot, sitting in this place, say that the deed is void. The only question then is upon the sufficiency of the plea. It has been \*decided, that a plea stating the commission of adultery by the wife is not sufficient, upon this ground, that if the husband, when executing such a deed as this, thinks proper to enter into an unqualified covenant, he must be bound by it. Had he wished to make the non-commission of adultery a condition of paying the annuity to his wife, he should have covenanted to pay it *quamdiu casta vixerit*. A plea of a judgment in the Ecclesiastical Court, but not alleging the fact of adultery, is not at all more favourable for the defendant; our judgment must, therefore, be for the plaintiff.

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[ \*552 ]

BAYLEY, J.:

There is a very plain distinction between this case and *Durant v. Titley*. There the contract provided for future separation at the will of the wife; it was offering a premium to her for leaving her husband. In *Lord Rodney v. Chambers*, that objection did not apply, for the intervention of impartial persons was there

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required, to decide whether sufficient cause of separation did or did not exist. As to the general question, I am of opinion, that as it has for so long a period of time been the system of jurisprudence to hold such deeds valid, it is not for this Court to entertain the question that has been proposed. If any alteration is to be made in the law as now understood, it must be by a decision of the House of Lords, or by an act of the Legislature. Is the plea then an answer to the action? It is admitted, that a plea alleging the fact of adultery would not be sufficient; neither is the decree of a spiritual court an answer; for it proceeds upon evidence which, in this Court, would not be deemed satisfactory. We cannot, therefore, even act upon the supposition that adultery has been committed. That being so, the \*plea is insufficient, and the plaintiff is entitled to our judgment.

[ \*553 ]

HOLROYD, J. :

This is a covenant made to provide for a separation which had been determined upon before the execution of the deed, and is for the payment of an annuity during the wife's life, if the husband should so long live. It is founded upon what the law considers a good consideration; for there is a covenant by the trustee to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, or thirds.† It is conceded, that adultery would not be a forfeiture of an annuity so granted. That a jointure would not be thereby forfeited is shewn by *Sidney v. Sidney*,‡ which was confirmed by *Seagrave v. Seagrave*,§ where the question arose on a bond containing provisions very similar to those in the deed in question. But it has been argued, that the wife, by suing for restitution of conjugal rights, has done an act inconsistent with the deed, and that the covenant is thereby destroyed, as much as if they had come together again. It is to be observed, that the covenant is not limited to the period of separation. But if it is to receive that construction, that is only upon the ground that the wife, when reunited to her husband, would be maintained by

† See *Compton v. Collinson*, 2 Br. C. C. 377; *Stevens v. Olive*, ib. 90; and *Rex v. Brewer*, ib. 93, n.

‡ 3 P. Wms. 269.  
§ 9 R. B. 203 (13 Ves. 439).

him, and therefore it does not follow that the deed is avoided by an unavailing attempt to obtain restitution. The case then resolves itself into the general question, whether a covenant is \*binding which provides for a separation between husband and wife, already determined upon, and not for a future separation at the mere will of either of them. The language of the LORD CHANCELLOR in *St. John v. St. John* is binding upon us. We cannot do otherwise than abide by those decisions which have from time to time been made both in courts of law and equity ; particularly where the covenant to pay the annuity is founded upon engagements on the part of the trustees which are in ease of the husband ; which distinction, in favour of such deeds as the present, is noticed by the MASTER OF THE ROLLS in *Worrall v. Jacob*.

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[ \*554 ]

BEST, J. :

It seems that the plea in this case is not offered as an answer to the action, so much on the ground of the deed being vacated by adultery in the wife, as on the idea of her having put an end to the articles, providing for her separate maintenance, by suing for restitution of conjugal rights. I can well understand what was said in *Bateman v. Ross*, because there the wife would have had a maintenance by living again with her husband. But here the husband opposed the attempt made by the wife, who, in consequence of that opposition, is still in need of the maintenance which it was the object of the deed to provide. As to the other point I entertain no doubt. Whatever opinions Judges may have entertained as to the policy or impolicy of such contracts as this, it would be a strong measure for us, on the mere ground of policy, to overthrow former decisions, when Lord ELDON, sitting in the House of Lords, did not feel himself strong enough to do so. In the case of *Bateman v. Ross*, he must have advised the Lords\* to decree in favour of the articles, for it appears that they were established, sufficient proof of the fact of reconciliation not having been given.

[ \*555 ]

*Judgment for the plaintiff.*

1824.  
Feb. 6.

[ 564 ]

SOAMES AND ANOTHER v. LONERGAN AND ANOTHER.

(2 Barn. & Cress. 564—573; S. C. 4 Dowl. & Ry. 74; 2 L. J. K. B. 106.)

Where the charterers of a ship for a voyage from C. to St. B., and thence to G. to take in a homeward cargo, caused another ship to be chartered on their account to go out in ballast and bring home a cargo from G., with a proviso, that in the event of the non-arrival of the first-mentioned ship at G., then the second charter should be void: Held, that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not being attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her.

[ \*565 ]

ASSUMPSIT on a charter-party of affreightment made between the plaintiffs, owners of the *St. Patrick*, and the defendants. The first count alleged, that the plaintiffs thereby agreed that the *St. Patrick* should sail from the port of London in ballast to Cadiz, remain there fifteen days, and then proceed to Guayaquil,† and, if required, to such one other port on the west coast of South America as the said freighters or their agents might think proper and direct; and that in such case she should, in the first place, proceed to such other port, and subsequently to Guayaquil. And being arrived at \*such destined port or ports, should receive and take on board from the agents of the freighters all such lawful goods or merchandise as they might think proper, up to a full cargo; and having received such cargo, should proceed therewith to some port in Spain, England, or the continent of Europe, as the said freighters or their agents might direct. That the said ship should, if required, lay at her destined port or ports for the purpose of receiving the said cargo on board, and at her destined port of discharge for unloading the same, 120 running days in the whole, to commence and be accounted from the day the said ship should arrive at her first destined port of loading, being admitted to pratique and ready to receive goods on board, to cease when dispatched therefrom, recommence on her arrival at her second port of loading, if ordered to more than one, being admitted to pratique and ready to receive goods on board there, cease again when dispatched therefrom, and

† Sic throughout the report: it should be Guayaquil.—F. P.

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recommence on her arrival at her destined port of discharge, being also admitted to pratique and ready to deliver the said cargo. And the defendants agreed that they would, within fifteen days after the arrival of the said ship at Cadiz, dispatch her to Guyaquil, or previously to some one safe port on the west coast of South America, and should and would send alongside the said ship, at such port or ports, all such lawful goods as they might think proper to ship, and despatch her to some one port either in Spain, England, or the continent of Europe, and there receive such cargo from alongside the said ship within the 120 lay days thereinbefore limited for the purposes aforesaid, or within the days of demurrage thereafter mentioned; and would pay 6,000*l.* in full for the freight. The declaration then averred \*the arrival of the ship at Cadiz; that she was ordered to Lima, and arrived there on the 28th March, 1821; that the commander gave notice thereof, and offered to receive a cargo on board. Breach, that the defendants did not send alongside the vessel at Lima or Guyaquil, or any other port or ports on the west side of South America, or elsewhere, any goods, or supply any cargo, or despatch her to any port in Spain, England, or the continent of Europe. The second count set out the charter-party as before, and also a stipulation, that the vessel might be detained twenty days on demurrage, and the following proviso: "Provided always, and it was thereby understood and agreed by and between the said parties, that in the event of the non-arrival of the ship or vessel called the *Grant*, Hogarth, master, chartered and then on her voyage to St. Blas de California, at that port; then in such case that charter-party, and every clause and agreement therein contained should, in case no shipment should have been made under it, cease, determine, and be utterly void to all intents and purposes whatsoever." In addition to the averments in the first count this stated also that the *Grant* did arrive at St. Blas according to the tenor and effect of the charter-party. The third count stated, that a certain other charter-party was made between the plaintiffs and defendants in the same words and figures, and to the same purport and effect as that mentioned in the second count. It then alleged mutual promises, and that, in consideration of the premises, it was agreed by and between the

[ \*566 ]

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[ \*567 ]

plaintiffs and defendants, that the clause for annulling the contract in the event of the non-arrival of the *Grant* at St. Blas, should be extended to the event of the non-arrival of that ship at Guyaquil \*from St. Blas. Averment, that the *Grant* did arrive at Guyaquil from St. Blas, and then as in the first count. The fourth count, after the same introduction as in the third, alleged a promise by defendants to use reasonable diligence on their part, so that the charter-party might not be avoided by the non-arrival of the *Grant* at St. Blas. Breach, that they did not use reasonable diligence, and that through their negligence and default the *Grant* did not arrive at St. Blas. Fifth count alleged the substitution of Guyaquil for St. Blas, and a promise to use diligence that the *Grant* might arrive there. Breach as in fourth count. Various common counts were added. Plea, the general issue. At the trial before Abbott, Ch. J., at the London sittings after last Trinity Term, it appeared that a charter-party, in substance the same as that set out in the second count, was made by and between the plaintiffs and defendants; and that, afterwards, the proviso was extended to the non-arrival of the *Grant* at Guyaquil from St. Blas as alleged in the third count. The *Grant* was chartered by Barron and M'Pherson, merchants at Cadiz, on whose account also the charter-party of the *St. Patrick* was entered into by the defendants. In pursuance of that charter-party, the *St. Patrick* sailed from London in October, 1820, and arrived at Cadiz on the 15th of November following. Before the *St. Patrick* sailed from Cadiz, the captain, for himself and his owners, entered into another charter-party with Don Juan A. de Arambura, a merchant at Cadiz, to bring home a cargo from South America, subject to this proviso: "That in the event of the arrival of the *Grant*, then on her voyage to Guyaquil at that port, then that charter-party, and every clause and agreement therein \*contained, should, in case no shipment should have been made under it, cease, determine, and be utterly void, to all intents and purposes whatsoever." Barron and M'Pherson ordered the *St. Patrick* to proceed to Lima, for which place she sailed on the 10th of December, 1820, and arrived there March 28th, 1821, and on 30th the captain gave notice of his arrival to the Don Yzcue, the correspondent of Barron and

[ \*568 ]

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M'Pherson. The *St. Patrick* remained at Lima until July 21st, when the lay days, stipulated for in the charter, expired, and she was not after that time employed by the defendants or B. and M. under the charter-party. The *St. Patrick* was not dispatched to Guyaquil by Don Yzcue, or any person at Lima on behalf of the charterers, nor was any homeward cargo furnished for her. The ship *Grant*, in the proviso mentioned, arrived at St. Blas, March 5th, 1821, sailed thence for Guyaquil, June 5th, 1821, and arrived there October 19th, in the same year. On the 10th November following the captain made a protest, giving some account of the delay of his arrival, but not making any complaint that it had been caused by the freighters. The *St. Patrick* remained at Lima after the 21st of July, for the purpose of taking in a cargo, under the conditional charter. On the 24th of July she was taken possession of by the forces under Lord Cochrane, and liberated on the 23rd of August, and afterwards took in some cargo and 130 passengers for Cadiz, and was despatched therewith on the 12th of November, and sailed on the 15th, and after touching at Rio Janeiro, arrived at Cadiz, April 20th, 1822. The LORD CHIEF JUSTICE told the jury, that in his opinion the arrival of the *Grant*, mentioned in the proviso, meant, an arrival in time for the object of the charter of the *St. Patrick*, and that unless \*they thought that the arrival of the *Grant* had been improperly prevented by the defendants, or by Barron and M'Pherson, they should find a verdict for the defendants. The jury having found a verdict for the defendants, the *Attorney-General*, in Michaelmas Term, obtained a rule *nisi* for a new trial, on the grounds that the proviso in the charter of the *St. Patrick* was satisfied by the arrival of the *Grant* at Guyaquil at any time during her then voyage, and also, that it ought to have been presumed that she had been delayed improperly by the defendants, or Barron and M'Pherson.

[ \*569 ]

*Scarlett and F. Pollock* shewed cause :

The return cargo of the *St. Patrick* was to be bought with the proceeds of the cargo carried out by the *Grant*. The arrival of the *Grant* at Guyaquil was the very condition on which this charter-party was made ; that condition must necessarily have



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had reference to the arrival of the *Grant* within the scope of the voyage on which the *St. Patrick* was engaged, or it would be utterly useless and absurd. According to the construction contended for on the other side, the arrival of the *Grant* at any time would have been sufficient. If, indeed, the delay of the *Grant* could be attributed to the freighters of the *St. Patrick*, that might alter the case; but the jury have expressly found, that the freighters were not in fault. If the latter vessel, instead of remaining at Lima, had gone to Guyaquil, the captain would not have been bound to remain there more than 120 days; and, therefore, unless the *Grant* arrived there within that time, or such further time as the captain thought proper to wait, the charter of the *St. Patrick* was made void by the proviso; and therefore the circumstance of the *St. Patrick* not \*being despatched to Guyaquil by the agent of the freighters, cannot affect the present question.

[ \*570 ]

The *Attorney-General* and *Campbell*, *contra* :

Unless the LORD CHIEF JUSTICE was right in deciding, as a question of law, that the condition of the *St. Patrick's* charter was not satisfied, unless the *Grant* arrived in time for the purposes of the *St. Patrick's* voyage, the plaintiffs must have a new trial. Now it cannot be disputed, that the condition would have been satisfied had the *Grant* arrived at Guyaquil on the 119th day, and yet that could not have been of any service to the freighters of the *St. Patrick*, which vessel was then at Lima. The construction put upon this instrument cannot, therefore, be correct. Looking at the instrument itself, no line can be drawn, except the arrival of the *Grant* in the course of her then voyage. She did arrive in the course of that voyage, and thereby satisfied the proviso in the charter of the *St. Patrick*. The object of the voyage of the latter vessel cannot be taken into consideration in construing the charter-party, wherein it is not mentioned.

ABBOTT, Ch. J. :

I am of opinion that there ought not to be a new trial in this case. I left it to the jury to say whether the delay of the *Grant* had been occasioned by the default of the defendants; and

observed that, if it had, her non-arrival would not be a sufficient answer to the action. They thought that the defendants had not occasioned it. The next point is the construction of the charter-party; and if my opinion upon that was erroneous, the plaintiffs must have a new trial. My opinion was, that it meant such an arrival of the *Grant* \*as would answer the purposes of the parties to the charter-party. It is said that the only limit is arrival in the course of that voyage; but that might be so late as not to answer the purposes plainly designated by this instrument. Looking at that instrument alone, I still think as before, that the arrival of the *Grant*, in order to satisfy the proviso, should have been within the 120 running days, or the twenty additional days, during which the ship might be detained on demurrage, if the captain was required to wait so long.

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[ \*571 ]

BAYLEY, J. :

This case turns chiefly, if not entirely, upon the meaning of the term “non-arrival.” It may have an indefinite meaning; then it would be a mere wagering bargain between the parties; but it may also mean non-arrival within such time as may answer the purposes of the *St. Patrick's* voyage. The latter is, I think, the correct construction; and then, in order to satisfy the proviso, the arrival should have been within the stipulated running days, or such further period as the captain of the *St. Patrick* chose to remain on the coast; for, in the latter event, it would have been an arrival available to the freighters of that ship. If the term “non-arrival” is to be construed indefinitely, it would be totally unconnected with the purposes of the charter-party on which this action is brought, and there could have been no reason for inserting it. But in all probability the parties contemplated such an arrival of the *Grant* as would be subservient to the purposes of the freighters of the *St. Patrick*, and in default of such arrival this charter-party might be altogether useless to them. It is probable that both parties thought the *Grant* would arrive before the *St. Patrick*. If the *Grant* \*had not arrived within the 140 days allowed for running days and demurrage, the captain of the *St. Patrick* might still have waited, and I think

[ \*572 ]

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that, if he had, the arrival of the *Grant* during such stay would have satisfied the proviso, and have entitled the owners to claim the freight agreed for by the charter-party.

BEST, J. :†

I am of opinion that there is not any ground for disturbing the verdict in this case. The jury have found that the delay of the *Grant* was not attributable to the defendants. The remaining question depends upon the construction of the charter-party. It appears to me that the conduct of the plaintiffs has put an end to their claim. I agree that, if the *St. Patrick* had waited until the arrival of the *Grant*, the owners would have had a right to insist upon her being laden with a cargo for the homeward voyage. It may be true, that the voyage spoken of in the proviso was the voyage on which the *Grant* was then proceeding. It is also true that she did arrive at Guyaquil in that voyage, but before her arrival, the captain of the *St. Patrick* had put it out of his power to fulfil the objects of the charterers. It has been argued that they were bound to load her within 120 days, and certainly there is a stipulation to that effect in one part of the charter; but that is altogether inapplicable to the proviso, for until the arrival of the *Grant*, it could not be known whether that instrument would or would not be void. Now before the *Grant* arrived, the captain of the *St. Patrick* had made a new bargain, and had abandoned the original \*contract; the defendants, therefore, were not bound to provide a return cargo, and consequently the plaintiffs have no right to recover in this action

[ \*573 ]

*Rule discharged.*

† Holroyd, J., was in the Bail Court.

AMORY AND ANOTHER *v.* MERYWEATHER.†1824.  
Feb. 5.

[ 573 ]

(2 Barn. &amp; Cress. 573—579; S. C. 4 Dowl. &amp; Ry. 86; 2 L. J. K. B. 111.)

Debt on bond, conditioned for the payment of money by instalments. Plea, that defendant, by W., as his agent, made unlawful contracts for buying and selling shares in the public stocks; that these contracts were not specifically performed, but that W., as the agent of the defendant, voluntarily paid 500*l.* for differences against the form of the statute, and that for securing the repayment of that money to W., the defendant gave his promissory note to W., and that long after the same became due. W. indorsed it to the plaintiffs, and that the plaintiffs afterwards threatened to commence an action upon the note against the defendant; and the defendant, in fear of the action, did, at the request of the plaintiffs, give the bond in question, which the plaintiffs accepted in lieu of the promissory note, and the money secured thereby, they well knowing that the note had been made by the defendant on the occasion, and for the purpose in the plea mentioned: Held, that this plea was an answer to the action, inasmuch as the plaintiffs took the promissory note after it was due, and had notice of the illegality of the original consideration before the bond was given.

At the trial, it appeared in evidence that the note was given to W. to cover a sum which he, as broker, was to pay for losses on stock-jobbing transactions: Held, that this evidence did not support the plea which stated that the note was given to secure the repayment of money actually paid by W.

DEBT on bond, bearing date the 13th May, 1822, for 1,000*l.* Plea, first (after craving oyer of the bond and condition which was for the payment of 500*l.* by two instalments, the first of which became payable on the 13th May, 1823), *non est factum*. Secondly, that on the 18th May, 1817, the defendant, by M. White, as the agent and on the behalf of the defendant, made and entered into divers, to wit, one hundred unlawful contracts and agreements with persons to the defendant unknown, for the buying and selling of shares in a public stock or security of this realm to the amount of 10,000*l.* three per cents., to wit, at, &c. Averment, that the contracts were not specifically performed, but that afterwards, to wit, on, &c., at, &c., he, the said M. White, did, as the agent and on the behalf of the defendant, voluntarily pay and give the sum of 500*l.* to the said \*persons, with whom the said contracts had been made, for satisfying the respective differences for the not performing by the defendant of the said contracts, contrary to the form of the statute, and thereupon

[ \*574 ]

† See now Bills of Exchange Act, 1882, s. 36 (2).—R. C.

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for securing the repayment to White of 499*l.* 10*s.*, parcel of the sum of 500*l.* so voluntarily paid by M. White, and for no other purpose; defendant, on, &c., at, &c., at the request of White, made his promissory note, and thereby promised to pay three months after date to White or order 499*l.* 10*s.* That White indorsed the note to the plaintiffs, they knowing that it had been made by the defendant, on the occasion and for the purpose aforesaid; that after the note became due, the plaintiffs threatened to commence an action upon the note against the defendant, and thereupon the defendant gave the bond in lieu of the note and the money secured thereby. The third plea stated the making of the unlawful contracts, and that White paid 500*l.* for differences, and that for securing the repayment thereof to White defendant gave his promissory note, and then proceeded as follows: "that before the payment of the note, and long after the same had become due and payable, according to the tenor and effect thereof, to wit, on the 1st of January, 1820, White indorsed the note to the plaintiffs. That afterwards, to wit, on the 13th May, 1822, to wit, at, &c., the plaintiffs threatened to commence an action against the defendant for the recovery of the money in the note mentioned; and thereupon the defendant, in fear of the said action, did, at the request of the plaintiffs, to wit, on, &c., at, &c., make and seal, and as his act and deed, deliver to the plaintiffs the said writing obligatory in the declaration mentioned, and the plaintiffs then and there accepted and received the said writing obligatory in lieu of \*the said last mentioned promissory note, and of the said sum of money so purporting to be secured thereby as aforesaid, including also therein the sum of 5*l.* 5*s.* for the stamp impressed on the said writing obligatory and the costs thereof, and on no other account and for no other consideration whatsoever, the plaintiffs then well knowing that the said promissory note in that plea mentioned, had been made and drawn, and delivered by the defendant on the occasion and for the purpose in that plea mentioned, and on no other account or occasion." At the trial before Abbott, Ch. J., at the London sittings after last Easter Term, the execution of the bond was admitted, and White was called as a witness on the part of the defendant, and he proved that the

[ \*575 ]

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note was given to him to cover a sum which he, as broker to the defendant, was to pay for losses on stock-jobbing transactions. In May, 1819, he being in want of money, indorsed the note to the plaintiffs as a security for money which they advanced to him, but did not then inform them of the consideration upon which the note was given; but they were informed of it before the bond was executed. Upon this evidence, the LORD CHIEF JUSTICE directed a verdict to be found for the plaintiff on the second plea, inasmuch as the averment in that plea, that notice of the illegality of the note was given to the plaintiffs when they took the note, was not proved. He was further of opinion that the third plea was not proved, inasmuch as it alleged that the note was given to secure to White the repayment of money paid by White for compounding differences, whereas it appeared by White's evidence, that the note was given before the differences were actually paid. But it was contended that it was substantially proved, and a verdict was found for the plaintiffs on the first and \*second issues, and for the defendant on the last issue, with liberty for the plaintiff to move to enter the verdict for him on that issue, and in the event of his not succeeding in that rule, to move for judgment *non obstante veredicto*, on the ground that the bond was good, although the plaintiffs could not have sued on the note. A rule *nisi* had been obtained by the *Attorney-General* for entering the verdict for the plaintiffs on the last issue, or for judgment *non obstante veredicto*.

[ \*576 ]

*Scarlett* shewed cause :

The third plea is good, and was made out in proof. The defendant, therefore, is entitled to judgment on the whole record. It appears upon the plea that the bond was given as a substitution for a promissory note, which had been indorsed to the plaintiffs two years after it was due. As against these plaintiffs the defendant, therefore, would be entitled, in an action on the note, to avail himself of every defence which he would have had against the original holders: *Brown v. Turner*.† It is averred that the plaintiffs had notice of the illegality of the original consideration before the bond was given. Here, therefore, the

† 7 T. B. 630; 2 Esp. 631.

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[ \*577 ]

plaintiffs, holding a promissory note which they knew to be void (because it was given to secure money paid for differences on stock-jobbing transactions), took the bond in lieu of it. *Cannan v. Bryce*<sup>†</sup> is an authority to shew that that bond is void. Secondly, the plea was supported by the proof: it was necessary in the plea to state facts sufficient to shew that the plaintiffs could not recover, and it sufficed to prove substantially the facts stated. When a plaintiff sets out a contract \*specially, he can recover only on the contract as set out, and must, therefore, prove it literally; but it is otherwise where the contract is not specially stated. Here the substance of the plea is that the note was given to pay differences on stock-jobbing transactions, and that has been proved. It is wholly immaterial whether those differences were paid before or after the note was given. It would have been sufficient to allege that the note was given for and in respect of differences, &c. That is the substance of the allegation in the plea.

The *Attorney-General*, *contra* :

There can be no doubt, that by omitting or altering words the plea might be made to correspond with the evidence. The facts alleged have not been proved. The plea is, that White having paid the differences, the note was given to him for securing the repayment to him of that money which he had actually paid. The proof is, that the note was given to White to secure to him money which he had not then paid, but which he was to pay. Assuming the plea to be proved, still the plaintiffs are entitled to judgment, *non obstante veredicto*. Here it is alleged that the plaintiffs took the note from White after it was due, but without knowledge of the original consideration. It would undoubtedly have been a good defence to an action on the note, that it was originally given to secure money to be paid in respect of illegal stock-jobbing transactions; but it is no defence to an action on the bond, which is a new security, and not made between the parties to the illegal contract. In *George v. Stanley*<sup>‡</sup> the defendant had given bills for the \*amount of money lost at play: these bills were negotiated and came to the hands of the plaintiff,

[ \*578 ]

† 22 R. R. 342 (3 B. & Ald. 179).

‡ 4 Taunt. 683.

and when they became due the defendant gave in lieu of them other bills, and when these last bills became due, he confessed a judgment, which the court refused to set aside, unless it were shown that the holder of the bills had notice of the illegality of the original consideration.

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(HOLROYD, J. : Here the note was indorsed after it was due, and that is a suspicious circumstance, from which the law infers, that the party taking the note had knowledge of some infirmity in the title of the holder, and the indorsee then takes it, subject to all the objections to which it was liable in the hands of the person from whom he took it.)

In *Cuthbert v. Haley*† one Plank had discounted certain promissory notes of Haley's, and took usurious interest upon them, and then deposited them with his bankers, who gave him credit for them. When they became due, Haley not being able to pay, gave the bankers his bond. The latter had no knowledge of the usury between Plank and Haley. It was held that the bond was good.

ABBOTT, Ch. J. :

There is a great distinction between the two cases. Here the plaintiffs took the promissory note after it was due. There was no period of time when they could have maintained an action upon the note, and they had notice of the illegality of the original consideration before the bond was given. In *Cuthbert v. Haley*, the bankers had no knowledge of the usury at the time when the bond was given, and Lord KENYON, in delivering his judgment, relies upon that circumstance. We are all of opinion that, as it appears \*upon the plea that the bond was given as a substitution for a note which was taken by the plaintiffs, subject to an infirmity of title of which they had full notice before the bond was taken, the latter instrument is void. The rule, therefore, for entering up judgment for the plaintiffs, *non obstante veredicto*, must be discharged. We also think that the third plea is not supported by proof; but the defendant may have leave to amend

[ \*579 ]

† 8 T. R. 390; 3 Esp. 22.



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his plea upon paying the costs of the trial, with liberty to the plaintiffs to reply *de novo*.

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Feb. 6.  
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### HEAFORD v. KNIGHT.

(2 Barn. & Cress. 579; S. C. 4 Dowl. & Ry. 81; 2 L. J. K. B. 114.)

Where the plaintiff was discharged under the Insolvent Act (having assigned the debt to the assignee of the Court) after issue joined, and before notice of trial given, the Court stayed the proceedings until the assignee, or some creditor of the plaintiff, should give security for costs.†

*DENMAN* shewed cause against a rule obtained by *Hutchinson*, for staying proceedings until security was given for costs. The defendant's affidavit, on which the rule was obtained, stated the following circumstances. Issue was joined in Hilary Term, 1822, and notice of trial given for the adjourned sittings after that term. That notice was afterwards countermanded, and on the 13th of May following the plaintiff was discharged under the Insolvent Act. The sum claimed from the defendant was inserted in the plaintiff's schedule as a debt due to him, and an assignment was made in the usual form to the provisional assignee of the Court. The second notice of trial was given on the 15th of January, 1823. The defendant also swore that he had a good defence on the merits.

The Court ordered the proceedings to be stayed until the assignee or some creditor of the plaintiff should give security for the costs.

† It is to be presumed that this decision was not merely on the ground of the plaintiff's insolvency, but on the ground that he had divested him-

self of his interest. See per *BOWEN*, L. J., in *Cowell v. Taylor* (1885) 31 Ch. Div. 34, 38, 55 L. J. Ch. 92, 95. —R. C.

THE KING *v.* THE MAYOR, RECORDER, AND  
ALDERMEN OF THE BOROUGH OF FOWEY.

1824.  
*Feb. 9.*

(2 Barn. & Cress. 584—598; 5 Dowl. & Ry. 614; S. C. 4 Dowl. & Ry. 132;  
2 L. J. K. B. 86.)

[ 584 ]

The Court will not grant a *mandamus* to compel a corporation to elect members of an indefinite body, unless a strong case of necessity is shewn.

BEST, J., dissenting from the opinion of the majority, thought that a case of necessity was constituted by reason that the corporation had been reduced to a state such that there was no choice of persons to fill up the offices which by the charter are directed to be filled up by election.

By charter granted in the 59th Geo. III. reciting a former charter, and that by reason of certain neglects and omissions in the maintenance of a distinct and separate body of free burgesses, the corporation of Fowey was in danger of dissolution, the borough was constituted a body corporate and politic, by the name of the Mayor and Free Burgesses of the Borough of Fowey; and by that name they were to have perpetual succession. The charter then directed, that there should be nine of the most honest and discreet free burgesses of the inhabitants of the said borough, in manner thereafter mentioned, to be chosen, who should be called aldermen and council of the borough; \*and that one of the most honest and discreet aldermen of the borough, to be chosen as therein mentioned, should be called mayor; and that the mayor and aldermen for the time being should be called the common council of the borough; and that there should be one honest and discreet man learned in the laws of England, who should be called recorder. There then followed this clause, “that it should be lawful for the mayor and recorder, or their respective deputies, and the rest of the aldermen of the said borough for the time being, or the greater part of them, (of whom the mayor and recorder, or their respective deputies, were to be two,) from time to time and at all times thereafter, as often and when to them should seem fit and necessary, to nominate, choose, and prefer so many and such persons to be free burgesses of the said borough as they pleased, and to those free burgesses so to be chosen to

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[ \*586 ]

administer the oath for their fidelity to the said borough, and all things faithfully to do which belong to the place of free burgesses to be done. The charter then proceeded to nominate G. G. White the first and modern mayor of the borough, and J. Kimber, T. Graham, T. Orchard, W. Rashleigh, J. Bennett, J. Hallett, J. Messer, G. G. White, and Robert Hearle, to be the first and modern aldermen of the borough, to be continued in that office for their lives, &c. unless, &c. The charter then nominated G. Lacy to be recorder during his life, and as long as he should behave well. It then nominated R. P. Flamank, C. Bennett, N. Eveleigh, G. Thomas, and T. Nickells, to be the first and modern free burgesses of the borough, to be continued in that office during their lives, unless, &c. ; and in case any one or more of the aldermen of the borough for the time being should die \*or be removed from that office, that it should be lawful for the mayor, recorder, and justices of the peace, and the rest of the aldermen of the borough for the time being, or the greater part of them, to elect and prefer one other or more of the free burgesses, inhabitants of the said borough, for an alderman or aldermen of the said borough, in the place or places of him or them so happening to die or be removed, to supply the said number of nine aldermen of the borough aforesaid ; and that he or they, so as aforesaid elected or preferred to the office or offices of alderman or aldermen of the said borough, the office or offices should have and exercise during his or their natural life or lives, unless, in the meantime as aforesaid, for ill behaviour or any other offence he or they should be removed ; he or they so chosen first taking his or their corporal oath or oaths before the mayor, recorder, or one of the justices of the peace of the said borough for the time being, or before two or more of the aldermen of the said borough. And for want of mayor, recorder, justices, and aldermen (and not otherwise) before three or more free burgesses, inhabitants of the said borough for the time being, well and faithfully to execute that office in all things thereunto belonging. The charter then enabled the recorder to appoint a deputy and the mayor, the ex-mayor, the recorder, and the deputies of the mayor and recorder for the time being, and also

the senior aldermen of the said borough and the senior free burgess of the said borough, were made justices of the peace. The affidavit then stated that the several persons named in the charter as mayor, recorder, aldermen, and free burgesses, respectively took the oaths, &c.; and that the charter had in all other respects been accepted and put in execution; \*that for the last three years the body corporate had been, and still was, reduced to the number of six aldermen and four free burgesses; that of the six aldermen, one J. Kimber was in a very dangerous and precarious state of health, having had a paralytic stroke, and being upwards of seventy years of age, and that from such age and infirmities he was incapable of attending to his duties as an alderman and justice of peace; that of the remaining four free burgesses, one T. Nickells was upwards of seventy years of age, and was in a very infirm and dangerous state of health; that another, viz. R. P. Flamank, was also seventy years of age; and that another, N. T. Eveleigh, was not an inhabitant of the borough, and therefore not qualified to be elected an alderman according to the charter; that in consequence the said body corporate had been for some time and still was in great danger of being dissolved.

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*Wilde* in the last Term had obtained a rule *nisi* for a mandamus, directed to the mayor, aldermen, and recorder, commanding them to proceed to the election of a competent number of free burgesses of the borough, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election.

*Adam* and *Bernard* now shewed cause :

A mandamus will not lie to compel a corporation to elect members of an indefinite body. It issues only in cases of necessity, and to supply a defect of justice. There is no case in the books in which such a writ as that now asked for has been granted. In Buller's N. P. 201, it is laid down, " that where by charter or prescription the corporate body ought to consist of a definite number, and they neglect to fill up \*the vacancies as they occur, the Court will grant a mandamus." From this

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passage it may be inferred to have been the opinion of the learned writer, that a mandamus would not lie to compel a corporation to elect members of an *indefinite* body. So a mandamus will not lie to do an act which a party may do or not at his discretion. Per HOLT, Comyns's Dig. Mandamus, B 1. In *The Queen v. Heathcote*,† EYRE, J., says, all writs of mandamus are either to restore persons turned out, or to admit persons refused. In *Rex v. Pateman*,‡ it was stated in argument at the Bar as a clear proposition, that a mandamus would not lie to compel the corporation of Bedford to fill up the office of alderman, because the number was *indefinite*. These authorities shew that the general opinion in the profession has been, that a mandamus does not lie to compel a corporation to elect members of an indefinite body. But, secondly, there is no necessity in this case for granting a mandamus. For if it be refused, there is no danger of the dissolution of the corporate body. It is true, that if an integral part of a body politic be destroyed, and the remaining parts have no power to restore it, the corporation is dissolved, because it has lost an essential attribute, viz. capability of perpetual succession: *Rex v. Pasmore*.§ But in this case, if all the free burgesses became aldermen, the corporation would still be in no danger of dissolution, as the mayor, recorder, and aldermen would be competent to nominate, choose, and prefer such persons to be free burgesses as they pleased. Free burgesses are necessary only for two purposes: first, as a body out of which the aldermen \*are to be chosen; and secondly, for the purpose of assisting at the election of a mayor on the charter day. Now, assuming that all the present existing free burgesses were made aldermen, it would be competent to the latter body to proceed immediately to elect free burgesses, but there is no present duty in the now court of aldermen to proceed to the election of free burgesses before the vacancies in the court of aldermen are filled up; and it would be contrary to the spirit of the charter to compel them so to do. For the aldermen are a definite body consisting of nine, and the free burgesses are to be elected

† 10 Mod. 54.

§ 1 R. R. 688 (3 T. R. 199).

‡ 1 R. R. 621 (2 T. R. 777).

[ \*589 ]

by the mayor, recorder, and aldermen. The charter contemplated, therefore, that the free burgesses should be elected by a majority of the nine aldermen. Now, if the present mandamus were granted, the election of free burgesses would be by a majority of five; but it is obvious, that the course to be pursued according to the spirit of the charter in the present circumstances of the corporation is, first, to fill up the vacancies in the definite and electoral body of aldermen; and then, when that body is complete, secondly to proceed to the execution of its functions by nominating, choosing, and preferring such persons to be free burgesses as the majority of that perfect body shall think fit.

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*Gaslee and Wilde, contra :*

By the charter a present duty is created in the aldermen to elect free burgesses, or at least to meet to consider of the propriety of making such election. The charter appoints nine aldermen. Of these offices three are now vacant, and there are only three efficient free burgesses. Consequently, if all the vacancies in the court of aldermen were filled up, \*there would not be any efficient free burgess left. Although it has never been decided that a mandamus will lie to compel a corporation to elect members of an indefinite body, yet, if there be a duty to fill up vacancies in such a body for the purpose of perpetuating the corporation, then a mandamus will lie, because it is necessary for the purposes of justice. It is incumbent on those who apply for a mandamus in such a case to shew that the necessity exists, or in other words, that the charter will be defeated unless the election take place. Now in this case, unless the aldermen elect more free burgesses, the corporation is likely to be dissolved. Free burgesses are a necessary constituent part of the corporation. The senior free burgess is to be a justice of the peace, and in the absence of the mayor, recorder, and aldermen, certain oaths are to be administered by three free burgesses. The charter, therefore, contemplated that there should be always three free burgesses, and although there are that number at present, yet if the vacant offices be filled up, there will not be any efficient free burgess left. Besides, there

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ought to be a sufficient number of free burgesses to afford the aldermen the means of selection for filling up vacant offices in their body. But here, there being only three to fill the same number of vacant offices of aldermen, the latter will be filled by succession, and not by election as the charter directs.

ABBOTT, Ch. J. :

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I am of opinion that we ought to discharge this rule. There is no instance in which the court has ever granted a mandamus to compel a corporation to elect members of an indefinite body. The general principle of the Court, in issuing a mandamus, \*is very well defined to be, that whenever it is the duty of a person to do an act, the Court will order him to do it. The question is, whether, in the present state of the corporation, there is an imperious duty upon this body to proceed in the first place to the election of free burgesses. In this case, by the charter, there are nine aldermen, and an indefinite number of free burgesses, with a power for the corporation, from time to time, as they think fit, to elect persons to become free burgesses, and five are named free burgesses, and there are at present at least three free burgesses against whom there is no objection. Now, the following acts are to be done by the free burgesses: first, the senior is to be a justice of the peace. Secondly, they are to concur with the aldermen in the election of the mayor, and three of them are competent to do that. And in the absence of the mayor, recorder, and aldermen, they are to administer the oath to the persons elected aldermen, and three free burgesses may administer the oath. There are three, therefore, to administer this oath, if it be requisite for them to do so. Then the question really comes to this, whether we shall order the corporation to elect free burgesses before they proceed to the election of aldermen. There is a sufficient number of free burgesses remaining to fill up the vacancies occasioned by the loss of the aldermen; but it is said, that if all the vacancies were filled up, there would be no efficient free burgess remaining, for that the one remaining is incapable of acting in the discharge of his duty. That may be so, but at present there does not appear to me to exist any necessity for granting this mandamus.

It is said that we ought to make them elect free burgesses, in order to give the aldermen a more numerous class of \*free burgesses, from whom they may choose the new aldermen, and thus give them a greater number of persons, out of whom the choice may be made; but I do not know how we are to do that, for what greater number are we to give? Will five be sufficient, or twenty? The greater the number, there is certainly more opportunity of choice and selection, but we cannot say what number they ought to elect, with a view of giving a sufficiently large class out of which the aldermen may be chosen. It is worthy of observation, too, that the present free burgesses are those originally appointed by the charter of the Crown, which directed the aldermen to be filled up out of the burgesses, and, therefore, the Crown having proposed those five persons to be made free burgesses, considered them to be fit persons to fill the office of aldermen when vacant. Unfortunately this corporation have allowed a large number out of the nine offices of aldermen to become vacant, without filling up any one, and it may be that delay may have the effect of leading to a dissolution, but I cannot say that it will have that effect. If a mandamus were to issue to elect, and it was duly served upon all those whose duty it is to be present at such an election, if they should forbear to perform their duty, without assigning any good reason for such forbearance, the Court would know how to visit them for not having obeyed. It seems to me, however, that at present that strong case of necessity which ought to be made out in order to call upon the Court to direct the choice of free burgesses, prior to the choice of aldermen, has not been established. For these reasons I am of opinion that this rule must be discharged.

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BAYLEY, J.:

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For a considerable period of time my impression was, that we ought to grant a mandamus in order that a court might be held at which the corporation might exercise their judgment as to whether they would elect free burgesses or not, and whether they should elect burgesses before they went to the election of aldermen. But, upon consideration, it seems to me that we ought not to interfere at all; "*vigilantibus et non dormientibus jura sub-*



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*serviunt*” is a very good and useful rule, and one which may with propriety be applied to corporation cases. In this case there appears to me to have been great negligence in those persons on whose behalf this application is made. It was the duty of the existing corporation, as soon as a vacancy occurred, to have insisted upon its being filled up forthwith, and if that had been done then, inasmuch as the charter directed that the aldermen should be filled up out of the existing burgesses, and no new burgesses had been elected, the choice must have attached upon one of the then existing burgesses, and as soon as the vacancies were filled a majority of the nine must have concurred in deciding whether there should be any more free burgesses or not; and when a second party died the same question would have been again raised. Here, however, the parties have thought fit to wait until the number of aldermen has been reduced nominally from nine to six, and substantially to five, and, consequently, there are now in this corporation, when there ought to have been nine aldermen, five only. Now the charter has said, that it shall be in the judgment of the nine whether there should be any and what free burgesses; and if in this case we were to grant the mandamus, the new free burgesses would be elected, \*not by a majority of nine, but by a majority of five, which, as it seems to me, would be working some injustice, because that might entirely supersede the inchoate rights which the present existing burgesses originally obtained. For if, when the first vacancy had occurred, they had proceeded to an election, it is morally certain the choice must have fallen upon one of those, whereas, if the majority of the existing body are inimical to the interest of the present existing burgesses, you may have an entirely new set of burgesses, not named in the charter, elected to the vacant offices of aldermen. For these reasons I think the rule ought to be discharged.

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HOLROYD, J. :

I am of the same opinion. By the charter, the mayor and aldermen are to elect such and so many free burgesses as they shall think fit. It is not competent, therefore, to the Court to grant a mandamus directing them to elect any. Whether

a mandamus may be granted to compel the persons who, by the charter, were appointed to elect, to attend, in order to form a meeting to consider what free burgesses should or should not be elected, is another question. Without saying whether a mandamus would lie in such a case or not, I certainly doubted very much whether, supposing it would lie, this case was not a fit case for it to be granted. The result of the consideration which I have given to the subject is, that it ought not to be granted under the present circumstances; for although there are five free burgesses named in the charter, they are not to be considered as a definite body, for by the preceding part of the charter the mayor and aldermen may elect such and so many as they shall think fit; but in order that \*in the meantime there should not be wanting a body of free burgesses, the charter nominates five, but it does not, as in the case of aldermen, direct that there shall be any election to supply the places of the five burgesses nominated. It seems to me, therefore, to be an indefinite body, of which the Crown, in the first instance, nominated five, the number being to be indefinite, according to the will of the corporation, always supposing the members to act properly in the discharge of their duty. With respect to the aldermen, I take it to be the duty of the corporation, within a reasonable time after a vacancy in the number of aldermen has occurred, to fill up that vacancy, so that the body of nine should be completed, in order that the functions of aldermen and mayor (the mayor being one of the nine) should be performed, and that the town might have the benefit of the whole body to perform those functions. The question in this case seems to be, whether the election of free burgesses shall be by the majority of the five or six aldermen now existing, or whether it should be by a majority of the whole number of nine. If the present mandamus is to be granted, it could only be to consider whether they will elect or not; and even if they then determined to elect free burgesses, the election could not be by the full number of aldermen, whereas, if we require the aldermen to fill up the vacancies in their body in the first place, that would be agreeable to the intention and provisions of the charter. It appears to me, therefore, that the present mandamus ought not to be granted.

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Although I entertain some doubts upon this question, the inclination of my opinion is, that the \*mandamus ought to be granted. Undoubtedly it was the duty of the aldermen, from time to time, to fill up vacancies ; but, assuming that they were culpable in not filling them up, I think that is not any reason why we should not grant this mandamus, for this is not a question in which the interests of the aldermen only are to be considered, but the interests of the town ; and those interests ought not to suffer from the negligence of any member of this corporation. It is said, that we have not the power to grant this mandamus. If this application had been made a century ago, it would not probably have been granted, for at that time a mandamus was held to lie only to compel the performance of a ministerial duty, but modern cases have gone much further, and a mandamus now will lie for the performance of any public duty. In Buller's N. P. 201, it is said, that where by charter or prescription the corporate body ought to consist of a definite number, and they neglect to fill up the vacancies as they happen, the court will grant a mandamus, and the reason of that is, because the filling up of the definite body is necessary to give perpetuity to the corporation. Now if the same reason applies to an indefinite body, it follows, that the court ought to grant a mandamus to elect the members of that indefinite body. In this case, it appears to me, that in order to prevent the dissolution of this corporation, it is necessary that free burgesses should be elected. The King, by his charter, has granted that the body should be perpetual. It is therefore necessary for every component part of that body politic to do all that is essential to the preservation of the corporation. Now what is essential to its preservation ? Not a mere formal election, but a substantial election of the members \*of that corporation. Is not this corporation reduced to a state in which, if an alderman died, new free burgesses could not be elected ? Besides, the three existing free burgesses may force themselves into the court of aldermen, and every one of them may be incompetent to fill that office. There are now, indeed, four free burgesses, of whom one is a non-resident : but supposing there

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were only two, those two could force their way into the court of aldermen. I agree that we are bound to assume that these persons were duly competent to fill the office of free burgesses, because they are nominated in the charter, but a man may be fit to be a free burgess, and not fit to be an alderman. The latter is an office of magistracy, and the person who is fit to be a free burgess may be unfit to exercise the functions of a magistrate. With respect to inchoate rights I cannot agree that a person is to be elected because he is eligible. A man may be eligible, and still not have a right to be elected. It seems to me, that whenever a corporation is reduced to that state in which there is no choice of persons to fill up the offices which by the charter are directed to be filled up by election, it is then in a state in which it is necessary for the Court to interfere to compel them to do all that is necessary, in order that something like a free choice may take place. There cannot be any free choice in this instance. Although at present it appears that there are three persons eligible, still that will not bear the name of election; it is succession; and the moment that the three succeed the corporation will be entirely at the mercy of the majority of the whole. It seems to me to be a clear principle of law, that where there is a strong political necessity for an act to be done, this Court has a right \*to require that it shall be done; and I think also, that in this case there exists that degree of necessity. From the cases which have been cited, it appears that it has never been decided that a mandamus does not lie to compel the election of members of an indefinite body. Then, does not the principle upon which the Court has proceeded apply to an indefinite body, when reduced to one or two, as strongly as to a definite body? With respect to the dictum of EYRE, J. cited from 10th Modern, I cannot admit that to be law, because that would equally prevent the Court from adding to the number of a definite body. The true principle is, that this prerogative writ shall be granted in all cases where the justice of the country requires that it should be granted. If justice does not require it to be granted, the granting of it would be an abuse of the power vested in the Court. But if we see that justice will be defeated if it is not granted, we are not to be fettered in the exercise of our authority,

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THE KING by being told that in ancient times such a writ would not have  
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 OF FOWEY. granting a mandamus ought to be made absolute.

*Rule discharged.*

[5 Dowl. &  
Ry. 164.]

[On the 11th February, 1825, an attachment was moved for, and granted, against the mayor and corporation for not making a return to the writ. The mandamus had been served on the town clerk.]

1824.  
Feb. 9.

## THE KING, ON THE PROSECUTION OF JAMES LAW, v. WILLIAM MEAD.

[ 605 ]

(2 Barn. & Cress. 605—608; S. C. 4 Dowl. & Ry. 120.)

Defendant having been convicted of perjury, a rule *nisi* for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor, and on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose: Held, that it could not be read; for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration.

THE defendant was indicted for perjury, and, at the Middlesex sittings after Michaelmas Term, 1822, before Abbott, Ch. J., was found guilty. In Hilary Term, 1823, a rule for a new trial was obtained by the *Attorney-General*, on the ground of the verdict having been against the weight of evidence and upon affidavits.

*D. F. Jones* and *Chitty* now shewed cause, and, amongst others, tendered affidavits, stating a dying declaration of James Law, the prosecutor, who was shot by the defendant after the conviction. The perjury assigned, and of which the defendant was convicted, \*consisted in Mead's swearing, upon the trial of an information in the Exchequer, that Law had been present at and engaged in a smuggling transaction, at a place called the Salt Pans, in the parish of Scalby, in the county of York, on the 20th August, 1820, and upon the trial of which information Law was acquitted. The dying declaration of Law, after giving an

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account of the circumstances under which he was shot by Mead, proceeded to negative his having been present at, or having had any concern whatever in, the smuggling transaction deposed to by Mead in the Court of Exchequer.

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The *Attorney-General*, *Clarke*, *Gurney*, and *Walton* objected to these affidavits of the dying declaration being received. Dying declarations are only admissible in criminal prosecutions, where the death of the deceased, and the circumstances of the death, are the subject of the charge against a prisoner, whereas here the statement, disclosed by the affidavits tendered, was not made with reference to the death of the dying man, but with reference to the antecedent charge of perjury. In *Doe dem. Sutton v. Ridgeway*,† it was held that the dying declarations of a person, as to the relationship between the lessor of the plaintiff and the person last seised, could not be received in evidence.

*D. F. Jones* and *Chitty*, *contra*, contended, that the affidavits as to the dying declarations were admissible. The general principle upon which such evidence is competent, is founded partly on the situation of the dying man, which must be taken to have as much \*power over his conscience as the sanction of any oath could have, and partly on the manifest absence of any interest, when he is on the point of passing into another world: *Lord Mohun's case*,‡ *Rex v. Reason*,§ *Tinkler's case*,|| 2 Hume's Com. on the Law of Scotland respecting Crimes, 391. The rule contended for on the other side, limiting evidence of this kind to cases of inquiry as to the cause or circumstances of death, is much too narrow, for in *Wright d. Clymer v. Littler*,¶ evidence of a dying confession by the subscribing witness to a deed was held to be admissible. So also in the case before Heath, J., cited in *Aveson v. Lord Kinnaird*,†† the confession of an attesting witness to a bond, who, in his dying moments, begged pardon of heaven for having been concerned in forging the bond, was received. Secondly, there was a connection in this case between the transaction to which the dying declaration referred, and the

[ \*607 ]

† 4 B. & Ald. 53.

‡ 12 St. Tr. 949.

§ 1 Str. 499.

|| 1 East, P. C. 354.

¶ 3 Burr. 1244.

†† 8 R. R. 458 (6 East, 195).

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occasion of the death. The false accusation, to which the dying declaration referred, was the foundation of the personal hostility which led to the death. Thirdly, whether it would have been evidence on the trial or not, it may be received for the purpose of satisfying the Court upon the question of granting a new trial, in the same way as affidavits by parties themselves are received on similar occasions.

ABBOTT, Ch. J. :

[ \*608 ]

We are all of opinion that the evidence cannot be received. In the case before Mr. Justice Heath, the declaration amounted to a confession \*by the party himself of a very heinous offence which he had committed. The same observation applies to the case of *Wright v. Littler*. Here, the dying declaration of Law was for the purpose not of accusing, but of clearing himself. It therefore falls, not within the exception on which those decisions proceeded, but within the general rule, that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration.

*The affidavits were rejected.*

1824.  
Feb. 3.

[ 608 ]

MARY THRESHER v. THE COMPANY OF PROPRIETORS  
OF THE EAST LONDON WATER WORKS.

(2 Barn. & Cress. 608—618; S. C. 4 Dowl. & Ry. 62; 2 L. J. K. B. 100.)

Lessee, who has erected fixtures for the purpose of trade upon the demised premises, and afterwards takes a new lease to commence at the expiration of his former one which new lease contains a covenant to repair, will be bound to repair those fixtures, unless strong circumstances exist to shew that they were not intended to pass under the general words of the second demise.

*Quære*, whether any circumstances dehors the deed can be alleged to shew that they were not intended to pass?

*Quære*, whether limekilns, erected for the purposes of trade, are removable?

COVENANT on a lease. Breach, non-repair of premises. Plea, performance of the covenant. The cause was tried at the sittings at Guildhall after Trinity \*Term, 1823, when a verdict was found

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for the plaintiff, damages 500*l.*, subject to the opinion of the Court upon a case, stating in substance as follows. The lease upon which the action was brought, was a lease by indenture made by the plaintiff's ancestor to the defendants in the year 1791, reciting a former lease between the parties under whom the plaintiff and defendant claimed, made in the year 1756 for thirty-nine years; and which would not expire until 1795, and was in force at the time of making the lease in question. An under-lease of part of the premises was granted in 1788, by the lessees in the lease of 1756, to one Joseph Matthews for thirty-one years, and which, consequently, would not expire until 1814, several years after the expiration of the lease of 1756. The underlease of 1788 was granted in consideration of a former underlease, which had become vested in Joseph Matthews, and there was a covenant to repair, and to leave at the end of the term the premises so repaired, together with all such erections and buildings as then were or should be at any time thereafter built or set up in, upon, or about the same, or any part thereof. In 1780, Matthews erected a limekiln on the premises, at the expence of 160*l.*, and T. Ayres and Joseph Watford, the assignees of the term granted to Matthews, erected a similar limekiln on the premises in 1790. It also appeared by the underlease of 1788, that a warehouse and stable were then standing on the premises thereby demised. Both these limekilns were therefore existing in 1791, when the lease in question was granted. The limekilns were built of brick and mortar, and the foundations let into the ground. They were erected for the purpose of carrying on the trade of a lime-burner. The chalk and coals used in the business were brought up the river \*Thames, and the lime sold on the premises to customers. By the lease of 1791, the demise was of a piece of ground formerly called the Ozier Hope, and the wharfs and buildings erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the lease of 1756; and the premises were said to be in the occupation of the several persons therein named, and among others, of James Ayres, lime-burner, habendum the said piece of ground, wharfs, and buildings thereon erected and built. The lessees covenanted to repair, uphold, and maintain this piece of ground, erections, and

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buildings, wharfs, cranes, and ponds, and the hedges, ditches, pales, and fences, belonging to the premises, and the said premises so repaired, upheld, and maintained, to leave and yield up at the end of the term. The action was brought for the removal of these limekilns. The lease of 1783 afterwards became vested in one Meeson, who, after the expiration of the term thereby granted, held the premises thereby demised for some time, as tenant from year to year, to the defendants, and pulled down the limekilns four years ago. The question in the cause was, whether the removal of those limekilns was a breach of the covenant to repair contained in the lease of 1791?

*Amos* for the plaintiff:

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The limekilns were demised by the indenture of 1791. Fixtures will pass by a conveyance of the freehold: *Colgrave v. Dias Santos*.† Until severed, they are a part of the freehold, and the lessee has only a continuing privilege in respect of them: *Lee v. Risdon*.‡ A new agreement for the enjoyment of the land puts an end to the right of the tenant to remove \*them: *Fitzherbert v. Shaw*.§ Under a demise of lands, though some buildings are specifically named, yet all other buildings pass: Com. Dig. Grant, E. 3. It is true the demise is of the premises, as the same were demised by the former lease, and the limekilns were not in existence at the commencement of the former lease; yet buildings erected during a lease are considered in law as demised: *Lord Darcy v. Askwick*,|| Fitz. N. B. 55. The case of *Burton v. Brown*¶ is very similar to the present in that respect. The premises were potentially demised by the first lease: *Brown v. Blunden*.†† Then if the limekilns were demised as part of the land, or under the name of erections and buildings by the indenture of 1791, it is clear from the case of *Naylor v. Collinge*,‡‡ that the lessee was bound to repair them, although they were erected for the purposes of trade. Secondly, these limekilns could never have been removable as fixtures. No case has

† 2 B. & C. 76.

‡ 17 R. R. 484 (7 Taunt. 188, 2 Marsh. 495).

§ 1 H. Bl. 258.

|| Hobart, 234.

¶ 2 Cro. 648; Palmer, 319.

†† Skinner, 121.

‡‡ 9 R. R. 691 (1 Taunt. 19).

determined that fixtures may be removed where destruction must precede their removal. Were the contrary determined, it would authorise the pulling down of extensive manufactories erected during a lease for the purpose of trade, which would manifestly defeat, instead of promoting the commercial interests of the country, out of regard to which the exception in favour of trade has been engrafted on the rule of the common law respecting fixtures. To make an instrument of trade capable of removal, it must have been in its own nature a chattel, before it has been set up: *Lawton v. Lawton*.† These limekilns have always been in a freehold state. The case of *Penton v. Robart*‡ \*is distinguishable from the present, inasmuch as there the varnish-house, which was removed, had been brought from another place, where the defendant carried on his trade. In *Dean v. Allalley*,§ the description of the premises does not appear, or what parts were taken away; and in *Poole's* case,|| though pavement is mentioned in the pleadings, it cannot be collected from the judgment that the Court considered it removable.

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*Campbell*, for the defendant :

The first lease, which was granted in 1756, did not expire until 1795. It was a continuing lease, therefore, in 1791, when the last lease was granted. The limekilns at that time had been erected; they might therefore have been removed at any time during the continuance of the term granted by the lease of 1756; and if so, they must continue to be removeable. It is stated that they were erected for the purposes of carrying on the trade of a lime-burner. The Year Book, 20 Hen. VII., fol. 18, pl. 24. *Poole's* case, *Elves v. Maw*,¶ are authorities to show that they may be removed during the term, and *Penton v. Robart* shows, that a tenant may remove the fixtures at any time while he is in possession of them, even though he be a trespasser in respect of the land, by holding over; à fortiori, therefore, he may remove while he is in possession of the land under a new demise. The limekilns were the property of the lessee and not of the lessor, at

† 3 Atk. 13.

‡ 6 R. R. 376 (2 East, 88).

§ 3 Esp. 11.

|| Salk. 368.

¶ 6 R. R. 523 (3 East, 38).

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the time when the last lease was granted ; they did not therefore pass by the demise, for the landlord could demise \*only that which belonged to him. The lessee is not estopped by the lease from saying that the limekilns were not the property of the lessor, because the buildings demised were the same as were demised by the lease of 1756, and at that time the limekilns were not erected.

*Cur. adv. vult.*

ABBOTT, Ch. J., now delivered the judgment of the Court ; and, after stating the facts of the case, proceeded as follows :

The question in the cause is, whether the removal of the limekilns be a breach of the covenant to repair, contained in the lease of 1791.

On the behalf of the defendants three grounds of objection were taken.

First, that limekilns are not buildings within the meaning of a covenant to repair buildings ; but this is answered by the case, in which it is found that they were erected with brick and mortar, and their foundations let into the ground.

Secondly, that, being erected for the purpose of trade, they were removeable generally.

Thirdly, that, upon the true construction of the several leases set forth in the case, they were removeable, or rather that they were not to be considered as having been demised by the lease of 1791.

By this lease of 1791 the demise is of a piece of ground formerly called the Ozier Hope, and the wharfs and buildings erected and built thereon, situate, &c., and abutting, &c., as the same were demised by the lease of 1756, and the premises are said to be in the several occupations of persons therein named, and among others of James Ayres, lime-burner, Habendum the said piece \*of ground, wharfs, and buildings thereon erected and built. The lessees covenant to repair, uphold, and maintain the said piece of ground, erections and buildings, wharfs, cranes, and ponds, and the hedges, ditches, pales, and fences belonging to the premises ; and the said premises so repaired, upheld, and maintained, to leave and yield up at the end of the term.

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Now it is settled, by the case of *Naylor v. Collinge*,† that buildings erected for the purpose of trade, under a lease containing such a covenant, cannot be removed by the lessee, the terms of the covenant being general, and containing no exception. And this is highly reasonable, because the expectation of buildings to be erected during a term, and left at its expiration, is often one of the inducements to the granting of a lease, and forms a considerable ingredient in the estimate of the rent to be reserved. And if buildings for trade erected during a lease cannot be removed without the breach of such a covenant, neither can buildings erected before, and existing at the date of a lease, be removed without a breach of the covenant, unless there shall be some very special matter to take them out of the operation of the covenant. Whether any matter capable of having such an effect can exist dehors the deed may be questionable; but it is enough for the purpose of the present cause to say, that no such matter exists in this case.

Such matter was supposed to be derivable from the former lease of 1756, and the underlease of 1783.

In the lease of 1756 the premises are described as “all that piece of ground called the Ozier Hope, with the use of a crane, then standing on part of it, and part \*of which had been made into a wharf, for the landing, storing, and keeping goods, wherein are two docks, and the wharf is fenced off by pales, and part of which was formerly an ozier ground, but then converted into three ponds or reservoirs. It does not appear by the case whether any covenant to repair was contained in this lease, and the instrument is probably lost, and its contents known only by the recital of it in the lease of 1791, in which it further appears, that the lessees had applied for a further term of thirty-one years, which is granted at a considerable increase of rent. There is, therefore, nothing in this lease of 1756 that can restrain or qualify the covenant to repair in the lease of 1791; and it has not been shewn by what reason or rule of law the lessees of 1791, having accepted a lease (by indenture) of ground and buildings thereon, could be allowed to say that the ground only, and not the buildings thereon, should be deemed to pass by that

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THE EAST  
LONDON  
WATER  
WORKS CO.

[ \*615 ]

† 9 B. R. 691 (1 Taunt. 19).

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lease. It would be very difficult to maintain such a proposition, by the circumstance of the buildings having been erected by their under-lessee during the continuance of the first lease, even if such under-lessee, as between him and his own immediate lessor, had a right to remove the buildings; for the original lessor might very reasonably say, that he had nothing to do with any contract between other parties. But, upon adverting to the under-lease of 1783, the foundation of such an argument is wholly removed, because, by the terms of that underlease, the under-lessee, Matthews, has covenanted, not only to repair and uphold the premises demised to him, but also to leave, at the end of the term, those premises so repaired and upheld, together with all such erections and buildings as then were or should be at any time thereafter built or set up, in, upon, or about the same, or any part \*thereof. So that, according to the case of *Naylor v. Collinge*, the under-lessee himself could not have removed those limekilns without a breach of his covenant made with his own lessors.

[\* 616]

For these reasons our judgment is in favour of the plaintiff; and the postea is to be delivered to her.

*Judgment for the plaintiff.*

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### LAMBERT v. BUCKMASTER.

1824.  
Feb. 11.

(2 Barn. & Cress. 616—618; S. C. 4 Dowl. & Ry. 125; 2 L. J. K. B. 93.)

[ 616 ]

An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt, subsequently to the issuing of the Commission, to recover the amount of his bill.

JOHN BUCKMASTER and William Buckmaster, copartners in trade, were declared bankrupts November 16th, 1822. Before the commission issued J. Buckmaster was indebted on his separate account to his solicitor Watson. The two partners were also indebted upon their joint account to Watson. Subsequently to the issuing of the commission, Watson having in his possession two leases belonging to John Buckmaster's separate estate, and believing that if he sued the bankrupt and obtained judgment, the sheriff might sell the leases under the execution,

brought two actions, one against John Buckmaster for the amount of his separate bill of costs, and another action against the two partners for the amount of the bill of costs due on the joint account, and recovered the amount of those bills respectively. The taxed costs of these actions amounted to 47*l.*, and the assignees having demanded the leases, Watson refused to deliver them up until the amount of the two bills as well as the taxed costs of the two actions were paid. It appeared that the solicitor to the assignees had had notice from Watson that he should bring actions against the bankrupts, unless the amount of his bills \*were paid. A rule had been obtained, calling upon him to deliver up the deeds and papers upon payment of the amount of his bills only.

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v.  
BUCK-  
MASTER.

[ \*617 ]

*Hutchinson* shewed cause :

It is quite clear, that if the action was brought with the knowledge of the assignees that they must be liable for the costs, and it appears, that the solicitor to the assignees was informed, that unless the bills were paid, an action would be commenced. The assignees have no better claim than the bankrupt himself would have had if there had not been any bankruptcy. Now, he could not have had any right to his papers without paying the costs of the actions on the bills. If the assignees in this case had offered to pay the bills of costs when they ought to have done it, there would have been no ground for this application.

*Comyn, contra* :

The assignees are not liable for any debt incurred by the bankrupt subsequently to the issuing of the commission. Now the costs of the two actions were a debt incurred after the commission had issued. The right of acquiring the lien as against the bankrupt ended at the time when the commission issued.

(BAYLEY, J. : Suppose a mortgagor to have become bankrupt, and the mortgagee to have brought an ejectment to recover possession of the premises, could the assignees of the bankrupt redeem without paying the costs of the ejectment.)

LAMBERT  
r.  
BUCK-  
MASTER.

The mortgagee has the legal title, but the person claiming a lien has only an equitable title.

ABBOTT, Ch. J. :

[ \*618 ]

I think the solicitor had the same right of lien against the assignees that he had against the \*bankrupts. Now it is quite clear, that as against them his lien would have extended to the costs of the two actions, and I think that he has a lien to that extent in this case against the assignees, unless it could be shown that he, as an attorney of this Court, had improperly commenced the action. If, indeed, the debt had been tendered before the action was brought, that might have formed an answer to this claim for the costs of the actions, inasmuch as it would have been a defence to the action itself.

*Rule absolute upon payment of the debt and costs in the actions, and costs of the application.*

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1824.  
Feb. 12.

[ 622 ]

DOE, ON THE DEMISE OF REES *v.* THOMAS.†  
(2 Barn. & Cress. 622—623; S. C. 4 Dowl. & Ry. 145; 2 L. J. K. B. 94.)

*Semble*, that the Court will not stay the proceedings in an ejectment until the costs of a former ejectment are paid, if it appear that the verdict was obtained by fraud and perjury.

In this case an ejectment had been tried at the Court of Great Sessions in the county of Glamorgan, Wales, and a verdict found for the defendant. A new ejectment having been brought in this Court, a rule *nisi* had been obtained by the defendant to stay the proceedings until the costs of the former ejectment were paid,

*Russell* shewed cause, upon affidavits stating circumstances to shew that the former verdict had been obtained by fraud and perjury, and contended that, under such circumstances, the Court would not compel a party to pay the costs of a former ejectment before he had an opportunity of trying his right.

*W. E. Taunton, contrà*, contended that this rule was a matter of course, and that the Court would not enter into the

† Referred to by BYLES, J., in judgment on motion in *Tichborne v. Mostyn* (1872) L. R. 8 C. P. 29, 44, 41 L. J. C. P. 113.—R. C.

question upon affidavit, whether the verdict was \* obtained by fraud. That would have been the proper subject of a motion for a new trial.

DOE d.  
REES  
v.  
THOMAS.  
[ \*623 ]

*Russell* suggested that by the practice of the Court of Great Sessions in Wales the party was bound to move for a new trial within a very short time, and it appeared by the affidavits that that time had elapsed before it had been discovered that the verdict had been obtained by fraud and perjury.

Per CURIAM :

The rule to stay proceedings until the costs of a former ejectment are paid, is not inflexible ; and if the fact was clearly made out that the verdict had been obtained by the means stated in the affidavits, the rule ought never to have been granted. The whole matter was referred to the Master, to decide whether the lessor of the plaintiff should be at liberty to proceed to trial without paying the costs of the former ejectment, and upon his report the rule was afterwards made absolute.

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### GAINSFORD v. CARROLL AND OTHERS.

(2 Barn. & Cress. 624—625 ; S. C. 4 Dowl. & Ry. 161 ; 2 L. J. K. B. 112.)

1824.  
Feb. 12.  
[ 624 ]

In assumpsit for not delivering goods upon a given day, the true measure of damages is the difference between the contract price and that which goods of a similar quality and description bore, on or about the day when the goods ought to have been delivered.†

ASSUMPSIT for the non-performance of three contracts entered into by the defendants with the plaintiff for the sale of fifty bales of bacon, to be shipped by them from Waterford, in the months of January, February, and March, 1823, respectively. The defendant suffered judgment by default, and, upon the execution of the writ of enquiry in London, the Secondary told the jury that they were at liberty to calculate the damages according to the price of bacon on the day when the enquiry was executed, and that the difference between that and the contract price ought to be the measure of damages. *Parke* had obtained a rule *nisi*

† Sale of Goods Act, 1893, s. 51 (3).—R. C.



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v.  
CARROLL.

for setting aside the enquiry on the ground that the plaintiff was only entitled to recover the difference between the contract price and the price which the article bore at or about the time when, by the terms of the contract, it ought to have been delivered. He cited *Leigh v. Paterson*,† in which the Court of C. P. intimated an opinion that the damages should be calculated according to the price of the day on which the contract ought to have been performed. This is different from the case of a loan of stock; there the lender, by the transfer, deprives himself of the means of replacing the stock, he has not the money to go to market with, but in the case of a purchase of goods, the vendee is in possession of his money, and he has it in his power, as soon as the \*vendor has failed in the performance of the contract, to purchase other goods of the like quality and description, and it is his own fault if he does not do so.

[ \*625 ]

*Wilde, contra*, contended that the rule which had been laid down, as to the measure of damages, for not replacing stock, applied to the present, and he cited *Shepherd v. Johnson*,‡ and *M'Arthur v. Lord Seaforth*.§

PER CURIAM :

Those cases do not apply to the present. In the case of a loan of stock the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. Here the plaintiff had his money in his possession, and he might have purchased other bacon of the like quality the very day after the contract was broken, and if he has sustained any loss, by neglecting to do so, it is his own fault. We think that the under sheriff ought to have told the jury that the damages should be calculated according to the price of the bacon at or about the day when the goods ought to have been delivered.

*Rule absolute.*

† 20 R. R. 552 (8 Taunt. 540;  
2 Moore, 588).

‡ 2 East, 211.  
§ 11 R. R. 559 (2 Taunt. 257).

G. J. KAIN *v.* OLD AND OTHERS, EXECUTORS OF  
W. DODDS.†1824.  
Feb. 3.

[ 627 ]

(2 Barn. &amp; Cress. 627—635; S. C. 4 Dowl. &amp; Ry. 52; 2 L. J. K. B. 102.)

Defendant's testator being sole owner of a ship, signed and delivered to the plaintiff, G. J. K., an instrument, describing the ship as copper bolted, (but not reciting the certificate of registry); at the foot of which was written, "sold the within mentioned ship to G. J. K." He afterwards executed a bill of sale to the plaintiff in the usual form, which did not describe the ship as copper bolted. She was not copper bolted, and plaintiff declared in assumpsit against the defendants (as executors of the vendor,) for the breach of his warranty in that particular: Held, that the action could not be maintained, (1) on the ground that the first mentioned instrument was void as a contract by the 14th section of the (Merchant Shipping) Act, 34 Geo. III. c. 68 (since repealed); and (2) that the statement in the instrument could not be treated as a warranty, since the parties ultimately embodied their contract in a written instrument not containing such statement.

THIS was an action of assumpsit, in which the now plaintiff, George Joseph Kain, declared that in the lifetime of the said William Dodds, in consideration that Kain would buy from Dodds a certain vessel, to wit, the *Snow Fortitude*, at the price of 1,650*l.*, to be therefore paid by Kain to W. Dodds, he (Dodds) had undertaken and faithfully promised Kain that the said vessel was then copper bolted; Kain averred, first, that he, confiding in the promise of Dodds, had afterwards bought the said vessel of Dodds, and had paid to Dodds the price thereof; and the said G. J. Kain further confiding as aforesaid, afterwards, and after the death of the said W. Dodds, sold the said vessel to one James Shepherd, and upon such sale he, G. J. Kain, had warranted the vessel to be copper fastened. And the said G. J. Kain further said, that at the time of the making of the promise of W. Dodds in that behalf, and at the time of the said sale, the said vessel was not copper bolted, by means whereof the said vessel had become and was of little value to G. J. Kain; and by reason thereof J. Shepherd had impleaded Kain \*in a certain action on the case for damages sustained by Shepherd on occasion of the breach of the said warranty, and that such proceedings had been thereupon had in the said action, that Kain had been forced and compelled to pay, and had necessarily paid a large

[ \*628 ]

† Cp. *Freeman v. Baker* (1833) 5 B. & Ad. 797.

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v.  
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sum of money, to wit, 1,000*l.*, in satisfaction of the damages and costs recovered against him by the said J. Shepherd in that action, and in payment of the costs necessarily incurred by G. J. Kain in and about his defence to the said action, and concluded to the damage of the said G. J. Kain of 2,000*l.* At the trial before Abbott, Ch. J. at the London sittings after Trinity Term, 1822, a verdict was found for the plaintiff, damages 783*l.* 5*s.* 6*d.*, subject to the opinion of the Court upon the following case: On the 25th October, 1816, the testator being sole owner of a ship called the *Fortitude*, signed and delivered to the said G. J. Kain an instrument, of which the following is a copy: "For sale or charter, one boom mainsail, one lower steering sail, one middle stay sail, and one top gallant stay sail. The *Snow Fortitude*, A 1, British built, copper bolted, and new coppered in 1813, admeasures per register 277 tons, is well calculated for any trade where a vessel of her dimensions is wanted, lying in the Surrey canal. Inventory (here followed an inventory of stores, &c.). Sold the within-mentioned ship to Messrs. Kain and Son, (thereby meaning G. J. Kain.) W. Dodds." On the 28th October, 1816, the testator received the said 1,650*l.*, and duly executed a bill of sale of the said ship to the said G. J. Kain, containing the usual covenants, but which did not describe the *Fortitude* as copper bolted. On the 14th September, 1818, Kain having expended a considerable sum of money upon the *Fortitude*, agreed to sell her to J. Shepherd,\* according to printed particulars, substantially the same as those already set out. At the foot of those particulars, G. J. Kain wrote, "I agree to sell Mr. Shepherd the *Fortitude*, with all her stores, as per inventory, for the sum of 2,300*l.* G. J. KAIN." The *Fortitude* was conveyed by G. J. Kain to J. Shepherd by bill of sale, in the same form as that by which she had been conveyed by testator to G. J. Kain. In Hilary Term, 1821, J. Shepherd commenced an action upon the case against G. J. Kain, in the Court of King's Bench in respect of the said last-mentioned sale, and declared upon a warranty that the vessel was copper fastened, and there was a count for a deceitful representation that she was copper fastened. Upon the trial of that action, the jury found a verdict for Shepherd, damages 500*l.*, which, together with 142*l.* 10*s.*

[ \*629 ]

taxed costs, were paid by Kain to Shepherd before the commencement of this action. Kain's own costs in that action amounted to 140*l.* 15*s.* 6*d.*, and make together with the former sums the aggregate sum of 789*l.* 5*s.* 6*d.* Kain gave no notice of the action of *Shepherd v. Kain* to Dodds or his executors. At the time of the sale of the ship by W. Dodds to Kain, the ship was not copper bolted. The case was argued at the sittings in banc after last Hilary Term, and again in Trinity Term by

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v.  
OLD.

*Manning*, for the plaintiff:

The objection on the part of the defendant rests on two cases, *Biddell v. Leeder*<sup>†</sup> and *Pickering v. Dowson*;<sup>‡</sup> but they are both distinguishable from the present. The former turned upon the Register Act, 34 Geo. III, c. 68, s. 14§; but \*in that case there were words of present sale; here the instrument contains no such words; *Biddell v. Leeder* is therefore inapplicable. In *Pickering v. Dowson* it does not appear to have occurred either to the court or counsel, that an action could not be maintained on such an instrument as this; it turned entirely upon the attempt to travel out of the written agreement. It may be true, that the Register Act prevents this instrument from operating as an agreement, but it was a representation in writing, upon which a transfer was afterwards made.

[ \*630 ]

(BEST J: If it be a mere representation, where is there a warranty to bind the vendor's executors?)

The transfer having been made in consequence of the representation, a promise that it was a true representation must be implied. *Meyer v. Everth*<sup>||</sup> proceeded on the ground, that parol evidence of a representation could not be received, where the contract was reduced into writing. To decide with the plaintiff here will not interfere with the policy of the Register Acts, which were only intended to make known the equitable as well as legal owners of ships. The instrument may be void as a transfer or agreement to transfer for want of a recital of the certificate of registry, but it may still be binding as a representation. If it be

<sup>†</sup> 1 B. & C. 327; 2 Dowl. & Ry. 499.

§ Repealed 6 Geo. IV. c. 105.

<sup>‡</sup> 4 Taunt. 779.

<sup>||</sup> 15 B. R. 722 (4 Camp. 22).

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[ \*631 ]

held void to all intents and purposes, *Kerrison v. Cole*† cannot be law. *Wigglesworth v. Dallison*‡ shews, that even where a deed is executed, a collateral understanding between the parties may be shewn by the custom of the country, and that evidence of an express stipulation is not necessary. There the custom was held to be evidence of the bargain between the parties, so here the representation\* is evidence of a warranty by the vendor that the ship was copper fastened. The bill of sale in this case was not the agreement between the parties, but the completion of the agreement; the language was of one party only, and the covenants were merely such as the law would imply if not expressed: *Hodges v. Drakeford*,§ *Baker v. Paine*. Under such circumstances other evidence of the agreement between parties may be admitted: *Jeffery v. Walton*.¶

*Campbell, contra* :

This was an action of contract, and it was necessary to prove the consideration and promise laid in the declaration. The agreement in question was offered as proof of the promise, but that agreement is made void by the 34 Geo. III. c. 68, s. 14. It is immaterial whether it be a transfer or an agreement for a transfer, for it contains no such recital as required by that statute. This was decided by *Brewster v. Clarke*†† and *Biddell v. Leeder*, which are not to be distinguished from the present case. It cannot then operate as a contract. But it is said, that it may nevertheless operate as a representation, and therefore be evidence of a contract. But the statute says that such an instrument shall not be valid for any purpose, how then can it prove a contract? But admitting it to be a representation, still not being introduced into the subsequent contract, it is not binding. Where the whole contract is by parol, all that passes may possibly be taken as part of it; but it is otherwise where the contract is reduced into writing: *Countess of Rutland's case*,‡‡ *Meyer v. Everth*,§§ *Gardiner v. Gray*,|| *Powell v. Edmunds*,¶¶ *Hope*

[ \*632 ]

† 8 East, 231.

‡ Doug. 201.

§ 1 Bos. & P. (N. R.) 270.

|| 1 Ves. sen. 456.

¶ 1 Stark. 267.

†† 2 Mer. 75.

‡‡ 5 Co. Rep. 26.

§§ 15 R. R. 722 (4 Camp. 22).

|| 16 R. R. 764 (4 Camp. 144).

¶¶ 11 R. R. 316 (12 East, 6).

v. *Atkins*,† *Pickering v. Dowson*, *Lano v. Neale*.‡ If the representation were fraudulent it might perhaps have been the ground of an action *ex delicto* against the vendor, but cannot be considered as a part of the contract, so as to sustain this action of *assumpsit* against his representatives.

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v.  
OLD.

*Manning*, in reply :

The *Countess of Rutland's* case and the other cases cited, are applicable to parol evidence only, here the representation was reduced into writing, and is not therefore liable to the objection, that it is dangerous to admit evidence depending upon memory alone, to vary a contract which has been reduced into writing.

*Cur. adv. vult.*

ABBOTT, Ch. J. now delivered the judgment of the COURT :

This is an action of *assumpsit*, brought for the recovery of damages for the breach of an alleged contract. The declaration alleges that, in consideration that the plaintiff would buy of the defendant's testator a certain ship at a price mentioned, the testator promised that the ship was copper bolted ; that relying on that promise, the plaintiff bought the ship and paid the price ; that he afterwards sold the ship to one Shepherd, and on that sale warranted the ship to be copper fastened ; that the ship was not copper bolted ; that Shepherd brought an action against him on his warranty, and recovered damages and costs. At the trial before me it was found, that the defendant's testator being sole owner \*of the ship, signed and delivered to the plaintiff an instrument describing the ship as copper bolted, and containing an inventory of stores ; at the foot of which was written, "Sold the within mentioned ship to Messrs. Kain and Son, W. Dodds." And it was further found that the testator received the sum of 1,650*l.*, and executed a bill of sale of the ship to Kain. That bill of sale was in the usual form, and contained a recital of the certificate of registry, but it did not describe the vessel as copper bolted. It was further found that Kain re-sold the ship to Shepherd, according to printed particulars similar to those before mentioned, and executed to him a bill of sale similar to that

[ \*633 ]

† 1 Price, 143.

‡ 2 Stark, 105.

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which was executed by the testator; that Shepherd brought an action on the case against him on his warranty, that the ship was copper fastened, and recovered.

Upon this case the question is, whether the plaintiff has proved a promise according to his declaration. We think he has not. The first instrument, which contains a description of the ship as copper bolted, and an inventory of her furniture, and concludes with the words, "Sold the within mentioned ship to Messrs. Kain and Son, W. Dodds," cannot in our opinion be regarded as an instrument of contract. It is invalid either as a conveyance or as an agreement to convey the ship, by the Register Acts, because it does not contain a recital of the certificate of registry: *Biddell v. Leeder*.† And it is imperfect as an instrument of contract, because it does not mention the price, and this defect is not supplied by any fact appearing in the case; for there is no mention of any price as agreed between the parties before or at the time when Dodds the testator delivered the paper to the plaintiff: and the bill of sale mentions the sum of 1,650*l.* as the consideration of the sale, but does not mention any prior contract or agreement. We do not, however, rely on this imperfection, the objection arising out of the Register Act being decisive as to the invalidity of the paper. The bill of sale then is the only instrument of contract, and this does not describe the ship as copper bolted; though it contains covenants for the title and for further assurance. The description of copper bolted in the paper can therefore be considered as a representation only, and not as any part of the contract. The contract is in writing, as every contract for the sale of a ship must be.

[ \*634 ]

Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract. A matter antecedent to and dehors the writing, may in some cases be received in evidence, as shewing the inducement to the contract; such as a representa-

† 1 B. & C. 327; 2 Dowl. & Ry. 499.

tion of some particular quality or incident to the thing sold. But the buyer is not at liberty to shew such a representation, unless he can also shew that the seller by some fraud prevented him from discovering a fault which he, the seller, knew to exist. All this is very clearly laid down in the judgment delivered by the late Lord Chief Justice GIBBS in *Pickering v. Dowson*, and it is decisive of the present case wherein the plaintiff has neither declared \*upon, nor proved fraud on the part of the defendant's testator, but has declared upon a promise or contract. The postea, therefore, is to be delivered to the defendant.

KAIN  
r.  
OLD.

[ \*635 ]

*Judgment for the defendant.*

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JOHN CARD AND DAVID CANNAN v. WILLIAM HOPE.

1824.

[ 661 ]

(2 Barn. & Cress. 661—676; S. C. 4 Dowl. & Ry. 164; 2 L. J. K. B. 96.)

The sale of five-sixteenth shares of a ship engaged in the employment of the East India Company, by a deed containing a stipulation that the purchaser should, after the completion of the current voyage, be appointed to the command, held to be illegal and void.

COVENANT upon an indenture bearing date the 9th of December, 1818, which recited that Card and Cannan were together legally intitled, and stood possessed of, and interested in, nine-sixteenth shares or parts of the ship *Herefordshire*, at that time commanded by Captain John Money, and under a charter-party for freight to the East India Company for six successive voyages to and from the East Indies, two of which voyages had been performed; and that the defendant, Hope, had contracted with Card and Cannan for the purchase of five-sixteenth shares or parts of the ship at the price of 22,000*l.*, and upon the terms thereafter specified; and that Hope should be appointed to the command of the \*ship so soon as she should have completed her next or then voyage under the charter-party, if not earlier appointed to the said command, and that Card, or Card and Cannan, and the survivor of them, should continue to be the managing owner or owners of the ship, and should effect all the insurances on the five-sixteenth shares of the ship so agreed to be purchased by Hope, and conduct the other concerns of

[ \*662 ]



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[ \*663 ]

Hope as the owner of the said five-sixteenth shares thereof, in manner thereafter particularly described. This deed contained the following covenants: Card and Cannan covenanted to sell and transfer to Hope, and he covenanted to purchase five-sixteenth shares or parts of the ship, free and clear of all debt, claim, demand, or liability of any kind whatever, up to the time of the ship's entering into the dock for survey and repair previously to entering upon her next or third voyage, at the sum of 22,000*l.* sterling, to be paid in manner therein mentioned; that is to say, the sum of 10,000*l.*, part thereof, to be paid to Card on a good and valid bill of assignment, or transfer of the five-sixteenth shares or parts of the ship, being duly executed and made by Card and Cannan, or one of them, to and into the name of Hope, and the remaining sum of 12,000*l.* to be secured by the joint and several bond of Hope, and such other person as might be approved of by Card and Cannan, and to be made payable with interest at five per cent. per annum, in the proportions and at the periods following; that is to say, the sum of 5,000*l.*, part of the said sum of 12,000*l.*, to be payable on the 19th December, 1820, and the residue of the said sum to become due and payable on the 9th December, 1821. Covenant, that Card and Cannan, and the survivor of them, should be, and continue to be, the managing owners or husbands, owner, or husband of \*the ship, so long as they or he should be desirous to continue, and should faithfully and to the best of their or his ability attend to and conduct the concerns of the ship. And that so soon as the ship should have completed her next or third voyage, Hope should, if that event should not have before taken place, be appointed to the command of the ship on all her future and succeeding voyages, both for and during the continuance of the then charter-party, and such other voyages as, after the expiration or other determination thereof, she might undertake or perform; and that Card and Cannan, or the survivor of them, as such managing owner or owners, should do all necessary acts to have Hope effectually invested with the command of the ship according to the rules of the service of the East India Company; and that Hope should have and

enjoy all the usual advantages appertaining to and to be derived from such appointment and command; and further, that in case Hope should from ill health, or from any other cause, retire from and resign the command, or that he should depart this life before he should be appointed to or assume the command, or while holding the same, or as the case might be, that Card should be at liberty to appoint a fit and proper person as a successor to Hope, upon such terms as might be approved of by Hope or his executors, &c.; or upon such terms as Hope, his executors, &c. might be able to obtain on the nomination and appointment of such successor; and in case Card should decline to appoint such successor on the terms aforesaid, then that Hope or his executors, &c. should be permitted to appoint in his stead a fit and proper person to the command of the ship; and that such person so appointed, should be entitled to \*all the advantages that he, Hope, would by the said indenture be entitled to in right of such command; and that the managing owner for the time being should perform and fulfil all the several stipulations and agreements for the benefit and advantage of such person that might be appointed as last aforesaid that Hope would be entitled to demand and require if holding and in actual command of the ship; and further, that Card and Cannan, or the survivor of them, as such managing owners or owner, or ship's husband, should be allowed for all the expenses properly incurred in the management and conduct of the concerns of the ship, and a commission of 2l. 10s. per cent. upon all monies and freight received for the account of the owners of the ship, and in consideration thereof, that they, as such ship's husbands as aforesaid, should keep proper books and accounts of all the transactions entered into and carried on for and on account of the owners in respect to the management and concerns of the ship, as he or they should from time to time require; and that Card and Cannan, or the survivor of them, as such managing owners or owner as aforesaid, should from time to time give credit to Hope and the other owners of the ship for all monies, profits, and emoluments received for and on account of the ship and the owners thereof, and should and would give credit, and allow to the owners

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[ \*665 ]

[ \*666 ]

all discounts and allowances employed for and on account of the ship; and further, that Card and Cannan, as merchants and copartners, or the survivor of them, should from time to time be employed as the agents of Hope in the concerns of the ship, and effect the insurances on his five-sixteenth shares or parts thereof, also on all such investments on the several outward \*and home-ward voyages, as he might from time to time make and have on board the same ship, whether the same consisted of goods or specie: and that Card and Cannan, or the survivor of them, as such managing owners or owner as aforesaid, should have the right of nominating and appointing all the other officers to serve on board the ship, and that Hope should and would, on such nomination and appointment, present from time to time, and at all times thereafter, all and every such officers to the Honourable Court of Directors of the East India Company, in order to their being confirmed in their respective stations: that Card and Cannan, or the survivor of them, should and might select and appoint the several tradesmen and artificers for the outfit and repairs of the ship on her several voyages, so long as the said last-mentioned right of appointment was exercised and used by Card and Cannan, and the survivor of them, to the best advantage and interest of Hope, and the other owners of the ship: that in case Hope, or his heirs, executors, or administrators, should be minded and desirous to sell and dispose of the whole or any of the said five-sixteenth shares, that he or they should be at liberty so to do, upon the condition and express proviso, that any person or persons so purchasing the whole or any of the said shares should abide by and perform all the several terms, conditions, stipulations, contracts, and agreements thereinbefore expressed, declared, and agreed, and should do no act or deed to remove or displace Card and Cannan, or the survivor of them, from being the managing owners or owner of the said ship, or the agents or agent of the then or any future captain, so long as they continued to observe and keep all the \*several covenants, stipulations, and agreements to be performed on their part; and that such purchaser or purchasers should sign a memorandum, to be subscribed to the said indenture, agreeing to be bound and concluded

thereby, to all intents and purposes, as Hope, his executors, administrators, or assigns, would be bound and concluded, had he or they still held and retained the said shares. There then followed a covenant to submit disputes to arbitration. The declaration, after averring performance of covenants by plaintiffs, assigned three breaches, first, that defendant did not allow the plaintiffs to continue managing owners, or the husbands of the ship, but on the contrary thereof removed and displaced them. Second, that defendant did not employ plaintiffs as his agents in the concerns of the ship. Third, that defendant refused to submit differences to arbitration. Defendant pleaded several pleas. The question argued in the first instance was raised by a demurrer to two special pleas of the bankruptcy of the plaintiff, Card, which alleged, that by reason thereof the plaintiffs became and were incapable and unable to attend to and conduct the concerns of the said ship, as such managing owners and ship's husbands, according to the form and effect of the indenture. There was a second plea of bankruptcy, alleging, that thereby and by reason thereof, the defendant became and was discharged from the covenants. There were similar pleas to the second breach. To these pleas the plaintiff demurred, and in Michaelmas Term the case was argued upon the sufficiency of these pleas, the question being, whether the bankruptcy of Card was an answer to the action. On the part of the plaintiff the following \*authorities were cited: *Chippendale v. Tomlinson*,† *Silk v. Osborne*,‡ *Evans v. Brown*,§ *Fowler v. Down*,|| *Webb v. Fox*,¶ *Flood v. Finlay*,†† *Clark v. Calvert*,‡‡ *Weatherall v. Geering*,§§ and *Brooke v. Hewitt*.¶¶]

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[ \*667 ]

In the course of the argument it was suggested by the Court, that the deed itself might be void, on the ground that one of the main objects of it was a bargain for the appointment of a particular individual to the command of a ship which was then chartered for several successive voyages, and they directed

† 1 Cooke's B. Laws, 406.

‡ 1 Esp. 140.

§ 1 Esp. 170.

|| 1 Bos. & P. 44.

¶ 4 R. R. 472 (7 T. R. 391).

†† 12 R. R. 55 (2 Ball & Beatty, 9).

‡‡ 21 R. R. 528 (8 Taunt. 742;

3 Moore, 96).

§§ 8 R. R. 369 (12 Ves. 504).

||| 3 Ves. 253.

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a second argument upon this point. The case was again argued in this Term by

*Kaye*, for the defendant:

[ \*668 ]

This deed is void, inasmuch as it appears to have been founded on a sale of the command of the ship, and the appointment and the continuing of the defendant in that command was part of the consideration for the defendant's covenant to continue the plaintiffs as managing owners. Although the covenant to continue the plaintiffs ship's husband might be legal by itself, yet if the whole deed depends upon a fraudulent contract it is void. Now it is clear, from the recitals in this deed, that part of the original bargain was, that the defendant should have the command of the ship; and it is probable, therefore, that he either paid something more for the shares in consideration of his having that command, or that his appointment was the consideration for his covenanting to continue the plaintiffs as managing owners. In either case the plaintiffs \*derived a profit from the sale of the command. Now if this, instead of a deed, had been a parol contract, and Hope had brought an action against the plaintiffs for not appointing to the command, the declaration must have alleged, that in consideration that the defendant had purchased the shares in the ship, and had agreed to continue the plaintiffs as managing owners, they had promised to appoint him to the command. But *Blachford v. Preston*<sup>†</sup> is an authority to shew that such a contract is void. Besides, the deed is fraudulent as against the other part owners, for they have a right to expect the exercise of an impartial judgment in the selection of officers. The majority of the shareholders in value have the power of appointing officers, and any contract calculated to have the effect of fettering their judgment, is a contract in fraud of the other part owners. It is also fraudulent as against the charterers: they also have an interest in the appointment of fit persons to be officers, and they had a right to the exercise of an unbiassed judgment on that subject by the person having the power of appointing the officers. For the same reasons, also, this deed is contrary to public policy.

† 4 R. R. 598 (8 T. R. 89).

*Evans, contra:*

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F.  
HOPE.

The contract in this case was no fraud upon third persons, for this species of contract is in constant use among the owners of ships in the East India service, and they must, therefore, be taken to have been conusant of it. Neither was it a fraud upon the charterers. It is an established principle, that a party is not to be presumed to have done that which is against law; and there is nothing on the face of the deed to shew that there was any sale of the command. \*It does not appear that the price paid for the shares exceeded their real value. At all events, the covenant to appoint the defendant to the command is an independent covenant, and *per se* is not illegal. As to the agreement to continue the defendant in the command, that is mere surplusage, for the owners have not the power of removing a captain without the consent of the East India Company. In *Blachford v. Preston*† it was held that a sale of the command of a ship in the East India Company's service was illegal; but there, evidence was given to shew that it was contrary to the bye-laws of the company. Here, the bye-laws are not set out upon the pleadings, and the court cannot take judicial notice of them. As to the plaintiffs having the appointment of other officers, there is no danger of an improper person being appointed; because, before their appointment, they must undergo an examination, and be approved of by the Company. As to the profit to accrue to the plaintiffs as managing owners, *The Attorney-General v. Borrodaile*‡ is an authority to shew that managing owners have a right to commission. The agreement, in fact, gave the plaintiffs no power which they did not possess before; for the majority of the shareholders in value always have the control over the appointments. The plaintiffs, as owners of nine-sixteenths might therefore have appointed to the command, and if it were a fraud upon the other owners to agree that the defendant should be appointed to the command, it must have been equally fraudulent for one person to hold nine sixteenth shares; for by holding that number of shares, they acquired the power of appointing themselves managing owners, and of appointing \*the captain; and having got that power, they might surely sell

[ \*669 ]

[ \*370 ]

† 4 R. B. 598 (8 T. R. 89).

‡ 1 Price, 148.

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part of their shares, retaining in themselves the right to continue managing owners. Besides, the deed contains covenants for keeping proper accounts. In the case of a ship chartered in the common way, the owner certainly might appoint all the officers, although, where there is no stipulation to the contrary, that appointment may belong to the captain: *Rosiere v. Sawkins*.† Nothing appears on the pleadings about the East India Company. This case, therefore, stands upon the same footing as any other.

(BAYLEY, J. : The case which you state was that of a sole owner.)

It applies equally to the owner of a majority of the shares, for he must have the control if he pleases to exercise it. The exercise of such a power in the East India Company's service is in fact less dangerous than in any other ; for the choice of the voyage does not rest with the owners, and every officer undergoes a strict examination before he can be appointed. At all events, this is a question which cannot be properly disposed of by any tribunal but a jury ; for fraud is not to be presumed, but ought to be expressly found.

*Cur. adv. vult.*

The judgment of the Court was delivered in the course of the Term by

ABBOTT, Ch. J. :

[ \*671 ] This was an action of covenant brought against the defendant for refusing to allow the plaintiffs to continue managing owners or husbands of the ship *Herefordshire*, employed in the service of the East India Company, for refusing to continue them as agents to \*the defendant in the concerns of the ship, and to refer disputes to arbitration. To each of the first two alleged breaches of covenant, the defendant pleaded specially the bankruptcy of the plaintiff Card, before his refusal, concluding that by reason thereof he was discharged from his covenant. To these pleas the plaintiffs demurred ; and the case was in part argued on the sufficiency of the pleas in last Michaelmas Term.

† 12 Mod. 434.

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HOPE.

In the progress of the argument on that question, the Court suggested a doubt as to the legality of the deed itself, and directed the case to be argued upon that question, which was done in the present Term; and we are of opinion that the deed is illegal and void, and that judgment should be entered for the defendant, on the insufficiency of the declaration.

It will be necessary to advert to several parts of the deed at some length, in order to make the ground of our judgment intelligible.

(After reading the parts of the deed before set out, the LORD CHIEF JUSTICE proceeded as follows :)

Upon the perusal of the deed, it appears to be a sale of five-sixteenths of the ship to the defendant by the plaintiffs, then being owners of nine-sixteenths, and husbands or managing owners of the ship, founded upon and accompanied by an agreement between those parties, that the defendant shall be appointed to the command of the ship; that the plaintiffs shall continue to have the management as husbands, so long as they execute their duties faithfully and to the best of their ability, shall elect the tradesmen, and appoint all the officers; and further, that if the defendant shall relinquish the command, or die, the plaintiffs shall appoint such fit person to succeed him as may be approved of by him or his \*executors, upon such terms as he or they may be able to obtain, or that he or they may nominate a fit person to the command in his stead; that the plaintiffs shall be employed as the agents of the defendant in the concerns of the ship: And further, that if the defendant shall be minded to sell all or any of his five-sixteenths, he may do so, upon condition that the purchasers shall abide by the stipulations of the deed, and not remove the plaintiffs, or the survivor of them, from being managing owners, so long as they shall perform the stipulations on their part; and the purchaser shall sign a memorandum to be subscribed to the deed, agreeing to be bound thereby, as if the defendant himself had retained his shares. So that this, in effect, is a contract between the owners of the major interest in the ship, on a sale of a part of their interest, that the purchaser shall have the command of the ship at sea, and the sellers the management of her in port, and the appoint-

[ \*672 ]



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r.  
HOPE.

ment of all the other officers of the ship, and the choice of the persons who are to furnish and repair her, and this without the privity or concurrence of the other owners, as we must infer, because no such privity appears on the deed, and because, unless some of the other owners had concurred with the defendant in displacing the plaintiffs from the management, they would have retained it, his interest alone being insufficient for that purpose. And this contract was made at a time when the ship was engaged or chartered for several voyages, three whereof still remained to be performed. The covenant on the part of the defendant to continue the plaintiffs as his own agents in the concerns of the ship might be lawful if it stood alone, but being founded, as it is, on the contract for sale of the shares, and for the appointment to \*the command and the continuance of the management, if this its foundation be illegal, it becomes invalid, and cannot be enforced at law. And we are of opinion that this contract is illegal and void.

[ \*673 ]

The command of a ship in the service of the East India Company is well known to be a matter of very considerable value; so, likewise, is the management of such a ship as her husband. And it is impossible to read this deed without seeing that it is a bargain for a profit to be derived to the plaintiffs from the appointment of the defendant or his nominee to the command; the profit being either a greater price for the shares sold, or the continuance of the management and other powers and authorities in themselves, or partaking probably of both. And we are of opinion that such a contract is void, as being contrary to the interest of the charterers and of the other owners. It may be true, as was alleged by the learned counsel for the plaintiffs, that no person can be appointed to the office of commander, mate, or other officer in the service of the East India Company, without the approbation of the Company; but this will not alter the case, for the company are entitled not only to the security of such inquiry and examination as they may be able to make into the fitness of the persons recommended by the owners, but also to the benefit of a free, impartial, and disinterested recommendation, on the part of the owners, of the persons who are to be entrusted with so important a service as

the command and navigation, on a long and distant voyage, of a ship to be freighted with a very valuable cargo, and having on board a numerous crew and many passengers.

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r.  
HOPE.

It was further argued on the part of the plaintiffs, that we cannot in this case take judicial notice of any of the bye laws or regulations of the Company on this subject, because they are not stated on the record to which our view must be confined; and to this we accede; but whether we consider the East India Company to be, according to the expressions of Lord KENYON, in *Blachford v. Preston*, a limb of the government of the country, or such a body that, according to the opinion of Mr. Justice LAWRENCE, no distinction can be established between offices held under that Company and those under Government, as far as respects this purpose; or whether we consider the Company merely as private merchants, charterers of a ship, our opinion upon this case will be the same.

[ 674 ]

We think a contract like the present, regarding a ship engaged in any trade or service, must be void in law, as being contrary to the interest of the charterers and of the other owners. It is a part of our national policy to give every encouragement to the equipment and employment of ships. Upon this consideration, the law enables a majority of the part-owners (under guards, indeed, to the interest of the minority peculiar to itself) to employ their ship even against the will of the minority, that the ship may not remain unemployed. A power of employment vested in the majority seems to import a power of appointing officers, and in practice the majority certainly exercise that power. But such a power carries with it a duty, the duty of exercising a free and impartial judgment in the choice of every person who is to be entrusted with the management of the outfit and with the navigation of the ship, *ut dentur digniori*. And any contract which is calculated to have \*the effect of fettering the judgment, and of binding the party to concur in the nomination of particular persons, at the peril of an action, is a violation of that duty. The violation of duty becomes greater and more odious if the contract be founded on motives of peculiar gain and advantage to the contractor; all the part-owners ought to share rateably in every profit that may be made of the ship.

[ \*675 ]

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HOPE.

And if such contracts could be allowed by law, they must operate as a discouragement to persons to become part-owners of ships. The duty, however, is owing not only to the charterers and other part-owners of a ship, but also to all whose life or property may be embarked in her. And, consequently, a violation of the duty is contrary not only to the interest of the charterers and part-owners, but also to another most important object, namely, the protection and safety of the lives and property embarked on the sea. I have already observed, that although the charterers in this case may have the control over the appointment of the officers of the ship, yet that they are nevertheless entitled to the security of a free and impartial choice of the officers to be recommended to them. And with regard to the other owners, although it may be true that, by becoming owners at a time when a majority of the interest was vested in the plaintiffs, they knew that this majority of interest might, as it respects themselves, carry with it every power for the exercise and continuance of which this deed provides; yet they might well rely, for the faithful exercise of every authority, on the interest which the plaintiffs had in the prosperity of the ship, as being paramount to all other considerations. But this deed is calculated to deprive them of that security, because it continues a very large \*part of the same powers in the plaintiffs, after their interest in the ship is diminished, and may, by a still further severance, not only of the interest retained by them, but of that which they have conveyed to the defendant, accompanied with stipulations and obligations like those which are contained in this deed, ultimately place the entire management of the ship, by land and at sea, in the hands of persons who have very little interest in her. So that a deed like the present is calculated to deprive both the charterers and the other part-owners of that security to which they are entitled, and on which they must be presumed to have relied when they assumed those respective characters. For these reasons we are of opinion that judgment must be for the defendant.

[ \*676 ]

*Judgment for defendant.*

## K. B. EASTER TERM.

1824.  
May 5.WEAVER *v.* LLOYD.

[ 678 ]

(2 Barn. & Cress. 678—679; S. C. 4 Dowl. & Ry. 230; 2 L. J. K. B. 122;  
S. C. at *Nisi Prius*, 1 Car. & Payne, 295.)

Where a libel charged the plaintiff with various acts of cruelty to a horse, and amongst others, with knocking out an eye, and the defendant pleaded that the charge was true in substance and effect; the jury having found that it was true in all particulars, except that the eye was not knocked out: Held, that the justification was not proved, and that the plaintiff was entitled to a verdict on that plea.

CASE for a libel published in an Oxford newspaper. The paragraph set out in the declaration charged the plaintiff with brutal usage of a horse, in riding from Oxford to Abingdon, and after various particulars concluded as follows: "We learn that, on reaching Abingdon, the horse presented a most shocking spectacle, having one eye literally knocked out, besides being dreadfully lacerated and injured in various parts of its body. Being conscious that its condition would excite attention, he ordered the person who had the care of the horse not to let any one go into the stables." The defendant pleaded, first, not guilty; secondly, a justification averring the truth of each particular of the statement; thirdly, that the matters contained in the supposed libel were true in substance and effect. Replication, *de injuria*. At the trial before Garrow, B., at the last Oxford Assizes, the jury found a verdict for the plaintiff on the first plea, and as to the others, that two of the matters alleged were not true; viz. that the horse's eye, although much injured, was not literally knocked out, and that plaintiff had not ordered that no person should be allowed to go into the stable to see the horse; but that the alleged libel was true in substance and effect. The learned Judge then directed \*them to find a verdict for the plaintiff, and gave the defendant leave to move to enter a verdict in his favour, if the Court should think the third plea supported by the evidence. The jury accordingly found a verdict for the plaintiff with 1s. damages.

[ \*679 ]

*W. E. Taunton* now moved to enter a verdict for the defendant, and contended, that the jury were warranted in

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r.  
LLOYD.

finding that the alleged libel was true in substance and effect. The horse's eye was shewn to be much injured, although the sight was not entirely destroyed, and the supposed order, not to admit any person into the stable was not any part of the libellous matter, it was therefore unnecessary to prove the truth of it: *Edwards v. Bell.*†

Per CURIAM :

The defendant did not succeed in proving either of his special pleas. The second plea, which distinctly averred the truth of the two facts which were not proved, clearly was not supported, and the third plea alleging that the charge was true in substance and effect, must mean that each particular of the charge was true in substance. In the case cited, the passage not proved formed no ingredient of the charge against the plaintiff. Here, the statement that he knocked out the horse's eye imputed a much greater degree of cruelty than a charge of beating him on the other parts of the body. If we were to hold this a sufficient justification, exaggerated accounts of any transaction might always be given with impunity.

*Rule refused.*

† 25 R. B. 659 (1 Bing. 403).

## CAMBRIDGE v. ANDERTON.†

(2 Barn. & Cress. 691—693; at *Nisi Prius*, 1 Car. & Payne 213; S. C. 4 Dowl. & Ry. 203; 2 L. J. K. B. 141; Ry. & Moo. 60.)

1824.  
May 8.  
[ 691 ]

Where a ship by perils of the sea has got upon rocks, and is lying there so much injured as not to be capable of being got off and repaired at all, or not without an expense exceeding her value when repaired, the assured may recover for a total loss without giving notice of abandonment.

THIS was an action on a policy of insurance on the ship *Commerce*, at and from Quebec to Bristol. The plaintiff claimed as for a total loss. The facts of the case were these :

1824.  
April 24.  
[ 1 Car. & P. 213 ]

The vessel sailed from Quebec on the 8th of July, 1823; the pilot left at the usual place, about 150 miles off; she proceeded down the river St. Lawrence, and about half-past eight on the morning of the 13th of July, during the continuance of a thick fog, which commenced on the preceding morning, she struck on a ragged shore, about 200 fathoms from the land. The captain tried many ways to get her off, but did not succeed. He landed as soon as he was able, which was about twenty-four hours after she struck, and found they were about 220 miles from Quebec. He had a conference with all his officers, and the general conviction was, that it would \*cost less to build a new ship than to make the one in question seaworthy. A considerable quantity

[ \*214 ]

† This decision is commented on by Lord CAMPBELL in his judgment in the House of Lords in *Fleming v. Smith* (1846) 1 H. L. C. 513; by Lord ABINGER in *Roux v. Salvador* (1836) 3 Bing. N. C. 266 (cited in the judgment of the Judicial Committee in *Cossman v. West* (1887) 13 App. Cas. 176). The facts in the above report are taken from the report in Carrington & Payne of the proceedings at *Nisi Prius*. The too meagre statement of them in the report in Barnewell & Cresswell seems to have led to misapprehension. By the light of subsequent comments, the effect of the decision appears to be this:—(a) When by

perils of the sea a ship has got upon rocks and is there lying much damaged, it is a question of fact whether the thing is a ship or a mere wreck; (b) if it is a mere wreck there is a total loss without the necessity of abandonment; (c) where (before the time of submarine telegraphs) the captain, acting on the best local advice he could obtain, treated the thing as a wreck and sold it, this is cogent evidence of the fact that it was a wreck; (d) that evidence is not necessarily rebutted by the fact that the purchaser (who was a shipwright) had the skill, aided by good fortune, to convert the wreck into a ship.—R. C.

CAMBRIDGE of timber, forming the chief part of the cargo, saved the ship  
ANDERTON. from going to pieces. The captain went to Quebec, and saw the surveyor for Lloyd's, and agreed with him on the names of three surveyors, who were to inspect the ship. He afterwards, acting on their judgment, sold the ship and cargo. She was sold with her register. The purchasers were shipwrights, who did some repairs to her, and sent her on another voyage, in the prosecution of which she was lost. The captain, the mate, and the ship's carpenter proved that they saw her after the repairs were done, and did not think her fit to undertake a voyage, and that they would not have trusted their lives in her.

For the defendant it was argued, that the plaintiff could not recover as for a total loss ; for the ship was not sold as a wreck, to be broken up, but was sold with her register, to make another voyage ; and it was clear, from the circumstance of her being purchased by shipwrights, and repaired, that she must have existed as a ship ; and if a vessel exists in specie, and can by any repairs be made fit for sailing, it is not a total loss.

ABBOTT, Ch. J. :

The question in this case is, whether this is a total or a partial loss ; and, I think, in considering that question, we should look, not so much at the acts of the parties, either buyers or sellers, as at the accounts they give of the state of the ship itself. The circumstance of selling with the register is in general against a total loss ; but it is the act of the master, and ought not to be decisive. If on the evidence the jury think that she was utterly useless as a ship, after she struck, and never could be made useful, but at an expense equal to her value ; then I am of opinion, in point of law, that it is a total loss, with benefit of salvage, though the form of a ship remained.

*The jury found a verdict for the plaintiff as for a total loss.*

[ 2 B. & C  
692 ]

The Attorney-General moved for a new trial :

It may be admitted that under some circumstances the owner has the choice of giving up to the underwriters the thing insured, and claiming a total loss, or he may retain the property

and claim for an average loss ; but then he should give notice of abandonment in order to indicate his choice: *Hodgson v. Blakistone*,† *Martin v. Crockatt*,‡ *Bell v. Nixon*.§ In the next place, there was not sufficient evidence that it was necessary for the master to sell the vessel. In *Idle v. Royal Exchange Assurance*,|| which came before this Court on error, a *venire de novo* was awarded, because the special verdict did not expressly find that a sale was necessary. Here the ship was certainly greatly injured, but was not a wreck, for she was sold as a ship, with her certificate of registry.

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r.  
ANDERTON.

(ABBOTT, Ch. J. : The master had no power to sell the register.)

She was afterwards repaired and actually sailed on a voyage to this country.

ABBOTT, Ch. J. :

Whether the ship were repairable or not was left as a question to the jury, and I think that they disposed of it correctly. If the subject matter of insurance remained a ship it was not a total loss, but if it were reduced to a mere congeries of planks, the vessel \*was a mere wreck, the name which you may think fit to apply to it cannot alter the nature of the thing. [ \*693 ]

BAYLEY, J. :

I take the legal principle to be this : if, by means of any of the perils insured against, the ship ceases to retain that character and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss, without giving any notice of abandonment. This was decided in *Read v. Bonham*,¶ and although RICHARDSON, J. there differed from the rest of the Court, that was only upon the facts of the case, and not as to the legal principle upon which it was decided.

† Marsh. Ins. 611.

3 Moore, 115).

‡ 13 R. R. 281 (14 East, 465).

¶ 23 R. R. 587 (3 Brod. & Bing.

§ Holt, N. P. 423.

147).

|| 21 R. R. 538 (8 Taunt. 755 ;



CAMBRIDGE HOLROYD, J. : †

v.  
ANDERTON.

Where the damage sustained makes the loss a total loss, it is unnecessary to give notice of abandonment.

*Rule refused.*

The reasons given by Mr. Justice BAYLEY are more fully reported in Carrington and Payne as follows :

[ 1 Car. & P.  
215 ]

In Easter Term the *Attorney-General* moved for a new trial, on the ground that an abandonment was necessary; but the Court refused his application, Mr. Justice BAYLEY saying (the rest of the Court concurring): I take the legal principle to be, that if by any perils within the policy the ship ceases to retain the character of a ship, the party may sell her, and recover as for a total loss, without any abandonment. This appears from the case of *Idle v. The Royal Exchange Assurance Company*, 3 J. B. Moore, 115.† But as it seems a writ of error was brought in that case, and we do not exactly know what was the final result, I do not much rely upon it. There is, however, another case in 6 J. B. Moore,§ in which it was held, that if a sale be justifiable, the assured may recover as for a total loss. And though Mr. Justice RICHARDSON is said to have differed from the other Judges; yet it was not upon the general principle, but upon the peculiar facts. All he doubted about was, whether the sale was justifiable. It appears to me that the sale in the case before us was a justifiable sale. All the witnesses agree that a new ship might have been built for less than it would have cost to put the one in question into a serviceable state. I am of  
[ \*216 ] \*opinion that the plaintiff is entitled to recover as for a total loss, because that which was sold did not exist as a ship at the time of the sale.

† Littledale was in the Bail Court during the argument, and gave no opinion.

‡ 21 R. R. 538 (8 Taunt. 755).

§ *Read v. Bonham*, 23 R. R. 587

(6 Moore, 397; 3 Brod. & Bing. 147), where the Court held, that where the captain sold the ship, because he could not get her repaired, the jury might find for a total loss.

## RAVENGA v. MACKINTOSH.†

(2 Barn. & Cress. 693—698; S. C. 4 Dowl. & Ry. 187; 2 L. J. K. B. 137; S. C. at *Nisi Prius*, 1 Car. & Payne 264.)

1824. .  
May 8.  
[ 2 B. & C.  
693 ]

It is a good defence to an action for a malicious arrest, that the defendant, when he caused the plaintiff to be arrested, acted *bonâ fide* upon the opinion of a legal adviser of competent skill and ability, and believed that he had a good cause of action against the plaintiff. But where it appeared that the party was influenced by an indirect motive in making the arrest, it was held to be properly left to the jury to consider whether he acted *bonâ fide* upon the opinion of his legal adviser, believing that he had a good cause of action.

THIS was an action for a malicious arrest: plea not guilty. At the trial before Abbott, Ch. J. at the London sittings after last Hilary Term, the following \*facts were given in evidence: The defendant, who was an army accoutrement maker, resident in London, had, in January, 1822, made a contract with one Mendez, who then acted as the agent of the Government of Columbia, to supply and ship for the use of that Government a large quantity of arms and accoutrements; the defendant shipped the same, and received in payment of them certain debentures, signed by Mendez, as the agent, and for account of that Government. On the arrival of the goods in South America, the Columbian Government repudiated the contract, alleging that Mendez had exceeded his authority. In February, 1823, the plaintiff arrived in this country, vested with the character of accredited agent of the Columbian Government, and soon after his arrival an application was made to him by the defendant to acknowledge the contract made with Mendez, and to confirm the debentures which had been granted. The plaintiff refused to do this. On the 3rd of March the attorney of Mackintosh wrote a letter to Ravenga, stating, that by the laws of this country he was personally liable to pay the debt contracted by the Columbian Government, and that if he did not make some satisfactory arrangement proceedings would be taken against him, which would involve him in difficulties. On the 6th of March, Ravenga's attorney replied to this letter, and desired to be furnished with copies of the contract between

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† Cited in judgment of *CLEASBY*, L. R. 6 Ex. 329, 353, 40 L. J. Ex. B. in *Johnson v. Emerson* (1871) 201, 213.—R. C.

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Mackintosh and Mendez, in order that he might form an opinion whether or not Ravenga was personally responsible. In that letter it was stated that Ravenga was not authorized either to confirm the contract or the debentures, and that the Government of Columbia had disapproved of that contract, in consequence of Mendez having exceeded his authority. The \*defendant's solicitor refused to furnish any documents. It appeared further, that before the action was commenced, the defendant laid a case, and all his documents and papers, before a special pleader of considerable experience. One of the queries put in that case was, whether the Columbian Government was bound by the contract made by Mendez; another was, whether Ravenga (who at the time when that contract was made, held the office of Minister for Foreign Affairs in the Columbian Republic) was personally liable. Another query was, whether, in the event of Mackintosh causing Ravenga to be arrested, an action would lie at the suit of the latter for a malicious arrest, in case it should turn out that he was not liable? Upon this case an opinion was given, first, that the Columbian Government was liable; secondly, that Ravenga, as a member of that Government, was personally responsible; and thirdly, that an action would not be maintainable by Ravenga against Mackintosh for a malicious arrest, in case the Court should be ultimately of opinion that Ravenga was not personally liable. On the 5th of March 1823, the defendant made an affidavit, that Ravenga was indebted to him in 90,000*l.*, for goods sold and delivered, and on the same day a bill of Middlesex issued. The plaintiff was arrested on the 20th of March, and remained in custody until the 17th of May, when he was discharged upon bail. No further proceedings were taken in the action until Michaelmas Term, when a peremptory rule to declare was taken out, and a declaration delivered, but on the 15th of December, a rule to discontinue was taken out, and the defendant paid the taxed costs. Upon this evidence, the LORD CHIEF JUSTICE directed the jury to find a verdict for the defendant, if they were of \*opinion that, at the time when the arrest was made, Mackintosh acted truly and sincerely upon the faith of the opinion given by his professional adviser, actually believing that Ravenga was per-

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[ \*696 ]

sonally liable, and that he might be lawfully arrested, and that he (Mackintosh) could recover in that action; but to find for the plaintiff, if they were of opinion that Mackintosh believed that he must fail in the action, and that he intended to use the opinion as a protection, in case the proceedings were afterwards called in question; and that he made the arrest, not with a view of obtaining his debt, but to compel the plaintiff to sanction the debentures. The jury found a verdict for the plaintiff with 250*l.* damages.

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The *Attorney-General* now moved for a new trial :

In order to maintain this action, the plaintiff is bound to prove first, malice in the defendant; and secondly, that he had no reasonable or probable cause of action. Now, assuming that malice was proved in this case, by shewing that Mackintosh was influenced by an indirect motive, in arresting the plaintiff, viz. to induce him to sanction the debentures given by Mendez, still it was incumbent upon the plaintiff to shew, that Mackintosh had not any reasonable or probable cause of action against Ravenga. Suppose A. to be indebted to B., and to be in possession of a house, of which B. wishes to obtain possession, and B. threatens to arrest A. unless he consents to give up the house to him, and upon his refusal he does arrest him, could it be contended that such an action as the present could be maintained against B.?

(BAYLEY, J. : In that case there is an actual debt due; and that being so, there is not only a probable but an actual cause of \*action.)

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But still there is an indirect motive, and consequently, there is malice in the defendant, his object being, not to obtain his debt, but possession of the house. Whether there was probable cause or not is a question of law to be decided by the Judge.† When the facts are doubtful, the evidence may be left to the jury, in order to ascertain the facts; but as soon as they are ascertained, it becomes a question of law, and that question was not decided at the trial of this case. It appeared in evidence, that Mackintosh

† Bull. N. P. 14.

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had a probable cause of action against Ravenga, for he had a debt due to him from the Columbian Government; and he was advised, by a person of competent skill and knowledge, that Ravenga, who was a member of that Government, was personally liable for that debt. Although, therefore, he had not an actual, he still had a probable cause of action against Ravenga. He had a reasonable ground for believing that he had a cause of action, and that constituted a probable cause.

BAYLEY, J. :

I have no doubt that in this case there was a want of probable cause. I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts *bonâ fide* upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description. A party, however, may take the opinions of six different persons, of which three are one way and three another. It is therefore a question for the jury, whether he acted *bonâ fide* on the opinion, believing that he had a cause of action. The jury in this case have found, and there [ \*698 ] was abundant evidence to justify them in drawing the conclusion, that the defendant did not act *bonâ fide*, and that he did not believe that he had any cause of action whatever. Assuming that the defendant's belief that he had a cause of action would amount to a probable cause, still, after the jury have found that he did not believe that he had any cause of action whatever, the judge would have been bound to say, that he had not reasonable or probable cause of action.

HOLROYD, J. :

I think the case was left correctly to the jury, and that they have drawn a proper conclusion from the evidence. It is unnecessary to decide in this case, whether a party who acts upon a belief that he has a good cause of action (such belief being founded upon the opinion of a legal adviser of competent skill and ability) but influenced by a malicious motive, can be said to have a reasonable or probable cause of action, when in truth he has no actual cause of action, because the jury here have found that the defendant did not act *bonâ fide* upon the opinion given,

and did not believe that he had any cause of action whatever. Assuming, therefore, that a *bonâ fide* belief, founded upon the opinion of counsel, that a party had a good cause of action, when in fact he had none, would be sufficient to shew that he had a probable cause of action (upon which, however, I pronounce no opinion) still in this case, as it must be taken after the finding of the jury, that he did not believe that he had any cause of action, it is quite clear, that there was no probable cause; and that being so, there is no ground for disturbing the verdict.

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LITLEDALE, J. concurred.

*Rule refused.*

### WILLIAMS v. GLENISTER.

(2 Barn. & Cress. 699—702; S. C. 4 Dowl. & Ry. 217; 2 L. J. K. B. 143.)

1824.  
May 8.  
[ 699 ]

Where the parish clerk refused to read in church a notice which was presented to him for that purpose, and the person presenting it, read it himself at a time when no part of the church-service was actually going on: Held, that although a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards in order to take him before a magistrate.

TRESPASS for false imprisonment. The declaration stated, that the defendant, at the parish of Tring, &c., assaulted the plaintiff, and took him out of a certain church there, to a certain inn, and there imprisoned him for two hours. Pleas, first, not guilty; secondly, a justification, which was immaterial, as the defendant, being a constable, was entitled to give the whole defence in evidence under the general issue. At the trial before Alexander, C.B., at the last assizes for the county of Hertford, it appeared, that on Sunday the 24th of August last, the plaintiff presented a notice to the parish clerk at Tring, and desired him to read it. The clerk, after consulting the minister, refused to do so. After the Nicene creed had been read, and whilst the minister was walking from the communion-table to the vestry-room, and no part of the service was then actually going on, the plaintiff stood up in his pew and read the notice, which was to this effect: "Take notice, that a vestry will be held in this church, on, &c., to choose new church-wardens in the place of the present;"

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whereupon the minister desired the defendant, a constable, to take him out of the church. The defendant accordingly took him from the church to an inn, where he detained him for an hour after the service was over, and then allowed him to go, upon promising to attend before a neighbouring magistrate the next morning. The plaintiff accordingly did attend there, when he was dismissed by the magistrate, no complaint being made against him. [ \*700 ] \*It was objected for the defendant, that the action would not lie, for that the defendant did no more than he was justified in doing, in order to preserve tranquillity in the church. The LORD CHIEF BARON told the jury, that although the defendant might be justified in taking the plaintiff out of church, and detaining him till the service was over, yet he had no right to detain him after that time. A verdict having been found for the plaintiff,

*Adolphus* moved to enter a nonsuit, or have a new trial, and contended, that the defendant was justified in detaining the plaintiff, in order to take him before a magistrate. Immediately after the Nicene creed the rubrick has this direction: "Then the curate shall declare unto the people what holy days or fasting days are in the week following to be observed, &c., and nothing shall be proclaimed or published in church, during the time of divine service, but by the minister; nor by him any thing but what is prescribed in the rules of this book, or enjoined by the King, or by the ordinary of the place." The plaintiff, therefore, was clearly guilty of an offence against that direction, and improperly disturbed the congregation, by reading the notice, as proved at the trial. Now, by the 1 M. stat. 2, c. 3, s. 3, it was enacted, "that if any person or persons shall maliciously, wilfully, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble any parson, vicar, parish priest, or curate, or any lawful priest, preparing, saying, doing, singing, ministering, or celebrating the mass, or other such divine service, sacraments, or sacramentals, as was most commonly frequented and used, in the last year of the reign of Henry VIII., or that at any time hereafter \*shall be allowed, set forth, or authorised by the Queen's Majesty, &c., every such offender and offenders in any of the

[ \*701 ]

premises, his or their aider, procurer, or abettor, immediately and forthwith after any of the said act or acts, or other the said misdemeanors so committed, done, or made, at any time or times after shall be apprehended and taken by any constable or churchwarden of the said parish, town, or place where the said offence shall be so committed, or by any other officer, or by any other person then being present at the time of the said offence so unlawfully committed; which person or persons so apprehended, with convenient speed shall be brought and carried to any justice of peace within the said shire, or within any city, borough, &c., where the said offence shall be so committed:” and then power is given to the justice to punish the offender. And again, by the 1 W. & M. c. 18, s. 18,† it is provided, “that if any person shall willingly and of purpose, maliciously or contemptuously come into any cathedral, parish church, chapel, or other congregation permitted by this Act, and disquiet and disturb the same, or misuse any preacher or teacher, such person, upon proof thereof before any justice of peace, by two or more sufficient witnesses, shall find two sureties, to be bound by recognizance in the penal sum of 50*l.*, and in default of such sureties, shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence, shall suffer the pain and penalty of 20*l.*, to the use of the King.”

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(ABBOTT, Ch. J.: In order to bring the case within those statutes, must it not appear that the disturbance was wilful and malicious?)

The act of reading a notice, in the manner and at the time when the plaintiff did it, could not but \*disturb the congregation; and the law will presume that he intended to effect that which was the necessary consequence of his act.

[ \*702 ]

ABBOTT, Ch. J. :

It appears to me, that the 1 M. stat. 2, c. 3, merely gave to the common law cognizance of an offence which was before punishable by the ecclesiastical law; in order to be within that statute, the party must maliciously, wilfully, or of purpose, molest the person celebrating divine service. Had the notice

† S. 15 in Revised Edition of Statutes.



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been read by the plaintiff whilst any part of the service was actually going on, we might have thought that he had done it on purpose to molest the minister; but the act having been done during an interval when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give such a notice, I am not prepared to say that the 1 M. stat. 2, c. 3, warranted his detention, in order that he might be taken before a justice of peace. Neither does the case come within the Toleration Act, 1 W. & M. c. 18. That only applies where the thing is done wilfully, and of purpose maliciously to disturb the congregation or misuse the preacher. The detention of the plaintiff after the time when the service ended was therefore illegal, and we ought not to disturb the verdict which has been found.

*Rule refused.*

1824.  
May 7.  
[ 703 ]

### BOULTON v. CROWTHER.†

(2 Barn. & Cress. 703—711; S. C. 4 Dowl. & Ry. 195; 2 L. J. K. B. 139.)

By the General Turnpike Act, the trustees of roads are authorised to divert, shorten, alter, or improve the course or path of any of the roads under their management, and divert, shorten, vary, alter, and improve the course or path of any roads through or over any commons or waste grounds, or uncultivated lands, without making satisfaction for the same; and through or over any private lands, tendering or making satisfaction to the owners thereof and persons interested therein for the damage sustained thereby: Held, that under this clause, the trustees are authorised to lower hills and raise hollows: Held, secondly, that the trustees are not liable to an action for a consequential injury resulting from an act which they are authorised to do.

THIS was an action against the defendant, as clerk to the trustees for putting in execution an Act of Parliament, the 56 Geo. III. c. 51, entitled “An Act for enlarging the term and powers of several Acts so far as relate to the roads from Birmingham through Wednesbury to High Bullen.” The declaration charged that the defendant wrongfully and injuriously caused to be banked up, raised and elevated, the highway adjoining the

† Cited in judgment of Lord L. J. in *Nutter v. Accrington Local HATHERLEY*, L. C. in *Att.-Gen. v. Board* (1878) 4 Q. B. Div. 375, 388: *Colney Hatch Asylum* (1868) L. R. 4 48 L. J. Q. B. 487, 492.—R. C. Ch. 146, 159; and of BRAMWELL,

plaintiff's pleasure ground and premises, to a height and level exceeding the previous ancient and accustomed height and level of the highway, and the level of the pleasure ground and premises, and thereby obstructed and stopped up the plaintiff's entrances from the highway through his gates into his pleasure-ground; and that large quantities of gravel, stones, and mud, accumulated in the highway so raised, fell into the plaintiff's pleasure ground and injured his plantations. Plea, not guilty.

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At the trial before Park, J., at the last Assizes for the county of Warwick, it appeared that the road mentioned in the declaration, adjoining to the plaintiff's pleasure-ground, had been lowered in one part and raised in another by the order of the trustees of the roads; so that the entrance gates to his premises situate next those parts of the road could not be used by persons coming to his premises with carts \*and other carriages; and that part of the materials of the road had fallen into the plaintiff's premises, and damaged his hedge and plantations, as alleged in the declaration. Some evidence was given to shew that the injury to the plaintiff accrued partly from the work having been done carelessly and negligently; but it was contended by the plaintiff's counsel, that the plaintiff was entitled to recover whether the work were done carefully or not. By the General Turnpike Act, 3 Geo. IV. c. 126, s. 83,† “the trustees of turnpike roads were authorised to make, divert, shorten, vary, alter, and improve the course or path of any of the several and respective roads under their care and management; and to divert, shorten, vary, alter, and improve the course or path of any of the said several roads through or over any commons or waste grounds, or uncultivated lands, without making satisfaction for the same; and through or over any private lands, tendering and making satisfaction to the owners thereof, and persons interested therein, for the damage that they shall sustain thereby.” It was contended, that although the trustees had not taken any of the plaintiff's land, yet as they had rendered it of less value to him in consequence of raising the road in some parts and lowering it in others, they were liable, although the Act had not provided a compensation for a consequential damage accruing to a party in a

[ \*704 ]

† Repealed by s. 8 of 9 Geo. IV. c. 77; but substantially re-enacted by s. 9 of the same statute.

BOULTON <sup>r.</sup> case where no part of his land was taken. The learned Judge, however, was of opinion that the action was not maintainable if the trustees used proper care and caution, and did nothing oppressive or arbitrary; and he directed the jury to find for the plaintiff, if they were of opinion that the trustees acted arbitrarily, oppressively, or carelessly; but if they were of a different \*opinion, then to find for the defendant. The jury having found a verdict for the defendant,

[ \*705 ]

*Jervis* now moved for a new trial :

The trustees were not justified in doing the act complained of, so as to cause an injury to the plaintiff's property. The Act of Parliament authorised them in general terms to alter and improve the course or path of the road. They were bound to do that in such a manner as not to injure the property of another. This is distinguishable from the case of *The Governors and Company of the British Cast Plate Glass Manufacturers v. Meredith*,<sup>†</sup> because there the Act of Parliament authorised the commissioners to pave the street, and it appeared that it could not have been done by any other means than those pursued. Assuming, however, that the act itself was lawful, still as the plaintiff has sustained a consequential damage resulting from that act, the defendant is liable in this action, although the trustees were acting in discharge of a public duty. *Leader v. Moxon* <sup>‡</sup> is an authority expressly in point. And in *Roberts v. Read*,<sup>§</sup> it seems to have been assumed, that the defendants were liable for a consequential injury resulting from an act done by them in their character of surveyors of the highway. Here, if the road had been diverted through the lands of the plaintiff, the trustees must, under the Act of Parliament, have tendered satisfaction, not only for the land taken, but for any damage resulting from the road passing through his land. But there is no provision in the Act of Parliament, by which the trustees are compelled to

[ \*706 ]

<sup>†</sup> 4 T. R. 794.

§ 14 R. R. 335 (16 East, 215).

<sup>‡</sup> 3 Wils. 461; 2 Bl. 924.

ABBOTT, Ch. J. :

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I think the question left to the jury by the learned Judge was the most favourable for the plaintiff that by law he could have propounded and left to their decision. This action was brought against the clerk to the trustees of a turnpike road, for an act which was done by them, which, in some respects, turned out to be injurious to the property of the plaintiff. The case, therefore, presents two questions. First, whether the act done by the trustees was an act which, by the 3 Geo. IV. c. 126, they were authorised to do; for if they were not authorised to do it, then undoubtedly they would be liable to an action for any injurious consequences resulting from it; but if they were authorised to do what they did, then it raises the question, whether an action can be maintained against persons who, in the execution of a public trust, and for the public benefit, do an act which by law they may do, but which act works some special injury to a particular individual. The first question is, whether the act done was an act which the trustees had an authority to do. Now that depends on the words of the 3 Geo. IV. c. 126, s. 83. By that section the trustees are authorised, "from time to time, to make, divert, shorten, alter, and improve the course or path of any of the several roads under their care and management, or any part or parts thereof." Now, before this Act of Parliament passed, the lowering and levelling of hills had become one of the \*most common and ordinary modes of improving the course or path of the public roads; and when the legislature gave the trustees, in general words, the power to improve the course or path of the public roads, it must be understood as giving them the power to effect that improvement by the usual and ordinary mode, viz. by raising or lowering the roads. If, then, the Act of Parliament gives an authority in terms to the trustees to alter and improve the course of the path of the roads which are under their care and management, I am clearly of opinion that the lowering of hills in a public road was an act which they were authorised to do under the terms, "improve and alter the course or path of the road." Then, if the act done be an act which they were authorised to do, the next question is, whether any individual who has sustained some special injury from the act done, can

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maintain an action at the common law. That he cannot, is expressly laid down by Lord KENYON and BULLER, J. in the case of *The Governors and Company of the British Cast Plate Glass Manufacturers v. Meredith*. The language used by Lord KENYON is very strong, and also very general. He lays it down as a principle, that if the commissioners act within their jurisdiction, the action at common law cannot be maintained, so that if the statute does not give the individual a remedy, he is without any; and the same rule is laid down by BULLER, J. It seems to me, that that case is a distinct authority as to the second point now raised. The Act of Parliament, I think, authorises the trustees to do what they have done. If, in doing the act, they acted arbitrarily, carelessly, or oppressively, the law in my opinion has provided a remedy. But the fact of their having so acted is negatived by the finding of the jury. I am \*therefore of opinion that the defendant was not liable to this action.

[ \*708 ]

BAYLEY, J. :

I am of the same opinion; and I think it would be most mischievous if any doubt could be entertained as to the liability of the trustees. The case of *Sutton v. Clarke* † resembles the present very closely. There the defendants had a public trust to perform, and a public duty cast upon them by Act of Parliament; and it was held, that they having acted without malice, and according to their best skill and diligence in the exercise of a public function which they were compelled to execute, although they had done an act which occasioned consequential damage to a subject, were not liable for such damage. It seems to me, that the learned Judge in his address to the jury adhered to the letter of the law as laid down by Lord Chief Justice GIBBS in that case. As to the objection that the learned Judge stated to the jury, that the trustees were bound to do what they did, I am of opinion that if they found that a material benefit would result to the public from lowering a hill and filling up a vale; and that it could be done without any material injury to the individuals whose property adjoined, it was not only a sound exercise of the discretion of the trustees to direct the alteration to be made, but

† 16 R. R. 563 (6 Taunt. 29; 1 Marsh. 429).

that it was their bounden duty to do so. There can be no doubt that the trustees would have been justified, if, in the exercise of their discretion, they had thought proper to stop up the road entirely, unless it could be shewn that it had been originally a parish road, of which there was no proof. In *Leader v. Moxon*, the decision proceeded upon the ground, that the commissioners had exceeded their authority in raising \*the pavement so as to obstruct the plaintiff's windows. In this case it appears to me, that the defendants have not exceeded their authority; and the jury having found that they did not act arbitrarily, wantonly, or oppressively, I am of opinion, that being public officers having a public duty to perform, they are not liable for a damage resulting to an individual from an act done by them in the discharge of that public duty.

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HOLROYD, J. :

I think that the law was most correctly laid down to the jury by the learned Judge. The trustees had a public duty imposed upon them by an Act of Parliament. The act complained of was done by them in the execution of that duty, and was one which they had a competent authority to do. I am of opinion that no action will lie for what they have done in the execution of that public duty, unless they exceeded the authority entrusted to them, or abused that authority, by acting arbitrarily, wantonly, or oppressively, in the mode of carrying it into execution. It would be absurd to hold, that an action would lie against them, for doing an act which they are empowered by Act of Parliament to do. The act done being itself lawful, can only become unlawful in consequence of the mode in which it is carried into execution; and here the jury have, by their verdict, negatived the fact of the act having been done carelessly, wantonly, or oppressively.

LITTLEDALE, J. :

I also think that this action cannot be maintained. I agree that a private individual must so use his own land as not to injure that of another, but the private individual acts for his own benefit, and he ought not to obtain a benefit at the expense of his

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 [ \*710 ]

neighbour. But where an Act of Parliament vests a power in \*trustees or commissioners, to be exercised by them, not for their own benefit, but for that of the public, and gives no compensation for a damage resulting from an act done by them in the execution of that power, the Legislature must be taken to have intended, that an individual should not receive any compensation for the loss resulting to him from an act so done for the public benefit. The plaintiff may have sustained a minute injury in consequence of the act done, but it does not therefore follow that any action is maintainable against the commissioners. Suppose the Act of Parliament had authorised them to enter upon the land of an individual, and they had entered and done him an injury, by going over the land, I should doubt very much whether any action would be maintainable. Trespass would not be maintainable, because they might justify under the Act of Parliament, and therefore the act of entry could not be questioned. It might even be doubted, if the act had authorised them to take the land, whether any action would lie against them for taking it. An ejectment would not lie, because the act authorised them to take the land. If any action would be maintainable, it must be assumpsit, founded upon an implied promise. But surely the law would not imply a promise in them to pay for that from which they derived no benefit, and which the Legislature authorised them to take. Here, however, they do not take the land; they only make some alterations in the road, from which a consequential injury arises to the plaintiff. The case of *Leader v. Moxon* is distinguishable from the present, because there the commissioners had exceeded their authority; and in *The Governors and Company of the British Cast Plate Glass Manufacturers v. Meredith*, Lord KENYON and BULLER, J., both say that \*where the Act of Parliament does not provide for compensation the action is not maintainable. In *Sutton v. Clarke*, Lord Chief Justice GIBBS lays it down that trustees are not liable. In *Jones v. Bird* † the commissioners were held responsible for an act done by them in the discharge of their duty, but it was expressly found that they had acted carelessly and negligently. It was assumed, however, that if they had acted with due care,

[ \*711 ]

† 24 R. R. 579 (5 B. & Ald. 837; 1 Dowl. & Ry. 497).

they would not have been responsible. Upon the general principles of law, as well as upon the authorities, I am of opinion that this action is not maintainable.

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*Rule refused.*

THE KING *v.* THE UNDERTAKERS OF THE AIRE  
AND CALDER NAVIGATION.

(2 Barn. & Cress. 713—714; S. C. 4 Dowl. & Ry. 253.)

1824.  
May 12.

[ 713 ]

A poor-rate must shew upon the face of it in respect of what property the assessment is made upon each individual charged by the rate.

UPON an appeal, by the undertakers of the Aire and Calder Navigation, against a rate or assessment made for relief of the poor of the township of Castleford, in the West Riding of the county of York, the sessions confirmed the rate, subject to the opinion of this Court, upon the following case. On the rate in question being produced, it appeared, that the property in respect of which the defendants were rated was specified; but with respect to all the other individuals charged thereby, it altogether omitted to state the property in respect of which they were rated. The first of those assessments was as follows :

Occupier.	Rate.	Assessment.
Ashton Joseph ;	1l. 8s. 9d. ;	2s. 10d. ;

[ \*714 ]

and all the other assessments were in a similar form. \*It was objected that it should have appeared by the rate, in respect of what property the assessment was made, and that objection was specifically pointed out by the notice of appeal. The Sessions overruled this objection, subject to the opinion of this Court. The case then set out the discussion which took place, as to the liability of the defendants to be rated in respect of the property for which they were charged; but it became immaterial, as the Court decided the case upon the first point.

*Blackburn and Bland*, in support of the order of Sessions :

The rate was sufficiently certain ; the word “ occupier ” over the name of the party rated, shews that he was charged in respect of real property ; and in charging the occupier, the very



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words of the 43 Eliz. c. 2 have been followed. That statute does not require that the description of property should appear in the rate.† The form adopted in this case is the one given in Burn's Justice, tit. Poor Rate; and if it be necessary to insert each description of property, it will, in large parishes, swell the rate to a very inconvenient size.

ABBOTT, Ch. J. :

The objection to the form of the rate is decisive. If any person wished to appeal, on the ground that another was under-rated, how could he tell in respect of what property the rate was imposed?

*Order of Sessions quashed.*

*Scarlett and Alderson* were to have argued against the rate.

† By the first section of that Act, power is given to raise weekly or otherwise "(by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propria-

tions of tithes, coal mines, or saleable underwoods in the said parish, in such competent sum and sums of money as they shall think fit)," a convenient stock, &c.

MORGAN *v.* PALMER.

(2 Barn. &amp; Cross. 729—739; S. C. 4 Dowl. &amp; Ry. 283; 2 L. J. K. B. 145.)

In assumpsit for money had and received, it was proved that Yarmouth has been a borough from time immemorial, and that until the time of Queen Anne the chief officers of the corporation were two bailiffs; and various charters had confirmed to them all the fees before received by them. By stat. 1 Ann. st. 2, c. 7 (local), all fees payable to the bailiffs were to become payable to the mayor when the style of the corporation should be changed, which was done by charter in the following year. At a meeting duly holden before the defendant, then mayor, (he being by virtue of his office a justice of peace,) and another justice, for granting and renewing the licences of publicans, the plaintiff applied to have his licence renewed, and upon having it done, was required to pay, amongst other fees, the sum of 4s. to the mayor, which was proved to have been regularly paid for a period of sixty-five years: Held, first, that the defendant was not entitled to take any such fee; for the payment for sixty-five years did not raise a presumption that it had been immemorially paid to the bailiffs or mayor of Yarmouth, inasmuch as licences were not granted until the reign of Ed. VI., and the defendant, as justice of peace, was not entitled to any fee for granting the licence. Secondly, that the defendant was not entitled to notice of the action about to be brought against him, for that the fee could not have been taken by him as a justice, *colore officii*. Thirdly, that the payment was not voluntary so as to preclude the plaintiff from recovering the money in this action.†

ASSUMPSIT to recover a sum of 4s. paid by the plaintiff, who is a publican in the borough of Great Yarmouth, to the defendant as mayor of that borough, and claimed by the defendant as having become due to him on granting to the plaintiff his annual licence as a publican. At the trial before Garrow, B., at the Norfolk Lent Assizes, 1823, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case. In the month of September, 1822, a meeting was duly held by the defendant, (who, in his character of mayor, was then one of the justices of the peace in and for the borough,) and by another justice of the peace in and for the borough, for the purpose of renewing the annual licences of the publicans in the borough. The plaintiff attended at that meeting in order to obtain a renewal of his licence, and the clerk to the justices, who is also town clerk, and clerk of the peace for the borough, on granting to the plaintiff his licence, demanded a sum of 12s. 6d., which the plaintiff accordingly paid. The clerk then paid over to the

† Cited upon this point in judgment in *Hooper v. Exeter Corporation* (1887) 56 L. J. Q. B. 457, 458.—R. C.

1824.  
May 18.

[ 729 ]

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[ \*730 ]

defendant a sum of 4s., part of the sum of 12s. 6d. which he had \*received, on the account and by the authority of the defendant as mayor; he also paid over a sum of 2s., other part of the said 12s. 6d., to the serjeant at mace, and retained the sum of 4s. 6d. as clerk of the justices, and 2s., the residue thereof, to his own use as clerk of the peace. Great Yarmouth is an ancient and immemorial borough. Until the reign of Queen Anne the chief officers of the corporation were two bailiffs. Various charters, from the reign of King John to that of Queen Anne, granted to the bailiffs all ancient and usual perquisites, fines, emoluments, and profits, which they had before by pretext of any incorporation, or by reason or pretence of any prescription, use, or custom held, enjoyed, or used. By stat. 1 Anne, st. 2, c. 7, it was enacted, "that when the style of the corporation should be changed from that of bailiffs, aldermen, burgesses, and commonalty, to that of mayor, aldermen, burgesses, and commonalty; the mayor and his successors should have and enjoy all the same fees, perquisites, privileges, and jurisdictions, as the bailiffs had before lawfully and rightfully claimed and demanded." By a charter in the year following, the style of the corporation was changed, and it was thereby provided, that the first mayor therein named and his successors should have and enjoy the same powers, privileges, fees, perquisites, and profits, as the bailiffs in any manner had before held and enjoyed within the liberties and precincts of the said borough. No entries were made of the sums paid for licences in the books of the corporation, but as far back as living memory went, that is to say, from 1765 up to the time of bringing this action, the same sum of 4s. had been uniformly received by the mayor for the time being from every publican applying for a licence, as his \*usual and accustomed fee for granting it. No notice of the action was given previously to its commencement. The questions for the opinion of the Court were, first, whether the plaintiff was bound to give notice of the action previously to bringing the same; second, whether the defendant was entitled to receive the said sum of 4s.; third, whether the plaintiff, having paid the said sum of 4s. in the manner above stated, was entitled to recover it back in this action.

[ \*731 ]

[After argument:]

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[ 793 ]

ABBOTT, Ch. J.:

I am of opinion that the plaintiff is entitled to recover in this action. The first and main question is, whether the defendant had any legal authority to demand the money in dispute. It has been conceded, that it must be due to him as mayor, independently of his character of justice of peace. And, indeed, it could not be put on any other ground, for the money is claimed as an immemorial payment, and the interference of justices of peace in granting licences clearly arose since the time of legal memory. It is found that the payment was claimed for granting a licence and that it has been taken for a long period of time. We cannot, however, thence presume that the mayor was entitled to the payment by any immemorial usage, \*because we know that licences to open public houses were not granted until long after the time of legal memory. At common law any person might, if he pleased, open a house for the entertainment of travellers and others. It is unnecessary for us to consider, whether a custom existing in any particular place restrictive of the privileges conferred by the common law would be legal or not; for no such custom is shewn in this case; and if any power had been vested in this corporation to grant licences before the 5 & 6 Ed. VI. c. 25,† I should have expected to find some evidence of such a privilege. I studiously avoid giving any opinion whether such a custom, if proved to exist, would or would not be good in law. This, however, should be remembered, that a custom to narrow the privilege of the subject must be established by clear evidence. As to the second point, whether the defendant was entitled to notice of action; if it be conceded that the money was taken by him in his character of mayor, independent of that of a justice of peace, then the 24 Geo. II. c. 44 does not apply. If it was taken in the character of justice, or if it were equivocal in which capacity the claim was made, then according to the case of *Briggs v. Evelyn*,‡ if the act were done *colore officii*, notice of action must have been given. But the object of that statute was to protect justices accidentally com-

[ \*794 ]

† Repealed, 9 Geo. IV., c. 61.

‡ 3 R. R. 354 (2 H. Bl. 114).

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[ \*735 ]

mitting an error in the discharge of their official duties, and not where the thing is done for their own personal benefit. This money was taken for the latter purpose, and that removes all doubt as to the necessity of notice. Then as to the last point. It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence \*would have followed had the parties been on equal terms. But if one party has the power of saying to the other, "that which you require shall not be done except upon the conditions which I choose to impose," no person can contend that they stand upon any thing like an equal footing. Such was the situation of the parties to this action. The case is therefore very different from *Brisbane v. Dacres*,† and our judgment must be in favour of the plaintiff.

BAYLEY, J. :

[ \*736 ]

I am of opinion, that the defendant was not entitled to any fee for granting a licence to the plaintiff; that the latter is entitled to recover it back in an action for money had and received, and that the defendant was not entitled to a month's notice of that action before it was commenced. The defendant must have taken the fee as mayor, he had no pretence for claiming it as a justice of peace. If it had been found by the jury that, by immemorial custom, no person could carry on trade in the borough of Yarmouth without a licence from the corporation, even supposing such a custom to be good, the money would have been received for the use of the corporation. There is not, however, any thing to shew the existence of such a custom, and the money was received for the individual benefit of the defendant as mayor. As a justice he had a public duty to perform, and had no right to any remuneration for it. Then, as to the question whether the money can be recovered in this action; if it had been a free and voluntary payment, there might be some difficulty; but I entirely agree with the observations of my LORD CHIEF JUSTICE, which shew, that the payment was by no means voluntary. There is also another \*ground upon which it might be put, viz. that as the defendant had a discretion to exercise in granting or refusing

† 14 R. B. 718 (5 Taunt. 143).

licences, it would be against public policy to allow him to receive fees, by which he might be biassed in the exercise of that discretion; and if so, the objection that this was a free and voluntary payment is inapplicable. As to the notice, I am of opinion, that as mayor the defendant was not entitled to it. The statute does not apply, unless the act were done by him as a justice; but in the latter capacity he had no pretence for claiming any thing. It is, therefore, impossible to say that the money was taken *colore officii*. The case of *Irving v. Wilson*† puts the question upon the right principle. There, an excise officer had improperly made a seizure of certain goods, and refused to restore them until the plaintiff paid him a sum of money; and it was held, that that money might be recovered in an action for money had and received, and that it was not necessary to give notice of the action, under the Excise Act. For these reasons, I think that the plaintiff must have the judgment of the Court.

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HOLROYD, J. :

By the common law, a licence to sell ale was not necessary, and I think that there is not any evidence of an immemorial usage or custom in this borough, from which we can infer that such licences were granted there. Without such a custom, the only ground upon which licences are granted, is the 5 & 6 Ed. VI. c. 25. But neither that or any other statute authorises the receipt of money by the person in whose discretion the granting of such licenses is placed. Whether a custom \*to take money for the exercise of such a discretion would be good in law, is, I think, very doubtful, for the reasons given by my brother BAYLEY. In this case the licence is stated to have been granted by the defendant, the mayor of the borough, and another justice. It is clear, therefore, that they must have acted as justices, and as such, their only power of granting licenses is given by the statute before mentioned. There was not, then, any pretence for claiming the payment in question. Neither was it necessary to give notice of the intended action. If the money had been taken by persons in the execution of their duty as justices, as for instance upon a conviction, then the case of *Greenaway v. Hurd*‡

[ \*737 ]

† 2 B. R. 444 (4 T. R. 485).

‡ 4 T. R. 553.

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would have applied, and notice would have been necessary. But this case is very different; for, even supposing that the defendant took the money in consequence of having done some act as a justice, (and it should be remembered, that although two justices acted, yet the money was taken by the defendant for himself alone,) still it could not be considered as taken in the execution of his office; and therefore, according to *Irring v. Wilson*, he would not be entitled to notice. Thirdly, I think that the money may be recovered in this action, and that it does not fall within that class of cases which apply to voluntary payments.

LITTLEDALE, J. :

[ \*738 ]

I am of opinion that this defendant has no right to retain the money which was paid to him by the plaintiff. He had not any legal authority to make the charge, either as mayor of the borough or as a justice of peace. The granting a licence was a public duty imposed by law, and for the execution of that he had no right to any payment. The claim can only \*be justified by immemorial usage, or by Act of Parliament. There is no statute authorising the claim, and the usage for sixty-five years, proved in this case, is not evidence of an immemorial usage. In *Rex v. Joliffe*† the usage applied to a court-leet, which had existed from time immemorial; and therefore, when that usage was shewn to have prevailed for twenty years, and there was not any thing to shew that any other usage had ever existed, it was reasonable to presume, that that which had existed for twenty years had existed as long as the court-leet itself. But here, the granting of licences is of modern introduction, and cannot be traced further back than the reign of Ed. VI. As to the notice which it is said should have been given, even supposing the defendant to have made the claim in his capacity of justice of peace, that was not done in the execution of his office. Where a justice orders a man to be apprehended, or his goods to be seized under a warrant, that is done in the execution of his office; and if the goods were afterwards sold, it might be necessary to give notice before an action could be commenced to recover the proceeds. Notice might also be requisite if the party paid money in order

† P. 264 ante (2 B. & C. 54).

to be relieved from some threatened proceeding by a justice ; but here, it cannot be pretended that the thing was done in the execution of the defendant's office. If, according to the usual course, the plaintiff was entitled to a licence, the defendant was bound to grant it. The granting it was in the execution of his office, but the claim of a fee for so doing certainly was not. Then comes the objection, that this was a voluntary payment. In *Bilbie v. Lumley*,† *Brisbane v. Dacres*,‡ and *Knibbs v. Hall*,§ both parties might, to a certain extent, be considered as actors. \*Here, the plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his licence. I think, therefore, that he is entitled to recover it back in this action.

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[ \*739 ]

*Judgment for the plaintiff.*

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THOMAS v. PEARCE.

(2 Barn. & Cress. 761—762 ; 4 Dowl. & Ry. 317 ; 2 L. J. K. B. 153.)

Where a defendant on being served with a copy of a writ, demands to see the original, and it is not shewn to him, the service is irregular, and will be set aside with costs.

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May 19.  
[ 761 ]

A RULE had been obtained by *Reader* to set aside the service of the copy of the bill of Middlesex, in this case, for irregularity. It appeared, that when the plaintiff served the defendant with the copy, he asked to see the original, when the plaintiff replied, that he had not got it with him, but that his attorney had it.

*Archbold* shewed cause, and contended, that the plaintiff was not bound to shew the original, when he served the copy. The statutes 12 Geo. I. c. 29 and 51 Geo. III. c. 124, s. 1,|| direct that, in certain cases, a copy shall be served, but do not require that the original process should at the same time be shewn. In *Worley v. Glover*¶ it was said, that the statute requiring service of a copy was the same as if it had said “deliver a copy ;” and *Boswell v. Roberts*†† was a similar decision.

† 6 B. R. 479 (2 East, 469).

‡ 14 B. R. 718 (5 Taunt. 143).

§ 1 Esp. 84.

|| These enactments are repealed ;

but, under the modern rules this case

seems still applicable to the service of an order for attachment.—B. C.

¶ 2 Str. 877.

†† Barnes, 422.



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PER CURIAM :

[ \*762 ]

In *Edgar v. Farmer*† Lord HARDWICKE expressly states, that the service of the process was bad, because the defendant was not allowed to see the original, although he demanded it when served with the copy. That is perfectly consistent with *Worley v. Glover* and *Boswell v. Roberts*, for it does not appear, that in either of those cases the defendant desired to see the original; and unless he expresses such a desire, the other party is not bound to shew it. This point was very lately before \*the Court of Common Pleas, in the case of *Westley v. Jones*,‡ when they acted upon the opinion expressed by Lord HARDWICKE in *Edgar v. Farmer*, and set aside the service of the copy of process, the original not having been shewn, although demanded. The Act of Parliament does not say that the plaintiff “shall deliver a copy,” but that he shall “serve the defendant personally with a copy.” Where that is required the party has a right, if he wishes it, to see the original, in order that he may have reasonable proof that he is served with a correct copy of the process; the service in this case was, therefore, irregular, and must be set aside with costs.

*Rule absolute.*

1824.  
May 31.

DOE ON THE DEMISE OF P. THOMAS AND FRANCES  
MARY HIS WIFE *v.* ACKLAM

[ 779 ]

(2 Barn. & Cress. 779—798; S. C. 4 Dowl. & Ry. 394; 2 L. J. K. B. 129.)

Children born in the United States of America since the recognition of their independence, of parents born there before that time, and continuing to reside there afterwards, are aliens, and could not (but for the Naturalization Act, 1870) inherit lands in this country.§

EJECTMENT, to recover certain premises in Kingston-upon-Hull. The demise was on the 1st of November, 1821. At the trial

† Ca. temp. Hardw. 138.

‡ 5 Moore, 162.

§ The points discussed in this case are comparatively of little importance since the Naturalization Act, 1870. An analogous question, however, relating to the claim of a

Hanoverian to vote for a representative at Westminster, came up for discussion so late as 1886. Stepney election: *Isaacson v. Durant* (1886) 17 Q. B. D. 54, 60; 55 L. J. Q. B. 331.—R. C.

before Abbott, Ch. J., at the York Summer Assizes, 1822, the jury found a special verdict, the material parts of which were as follows :

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Elizabeth Harrison, A. D. 1813, became seized in her demesne, as of fee, of and in a certain part of the tenements in the declaration mentioned ; and afterwards, and between that year and 1818, E. Harrison became seized in her demesne, as of fee, of and in the residue of the tenements in the declaration mentioned ; and being so seized thereof, she afterwards, on the 26th day of November, 1818, at, &c., died so seised of the said tenements, never having been married, and not having made any last will or testament. At the time of the death of Elizabeth Harrison, Frances Mary, the wife of Philip Thomas was and still is her next heir, if she the said Frances Mary can by law inherit the said tenements from Elizabeth Harrison ; and Peter Harrison was, during his lifetime, the uncle of E. Harrison,\* and also grandfather of the said Frances Mary. P. Harrison, being a natural born subject of this kingdom, went from England to America, and resided for many years, and until the time of his death, in the town of Newhaven, which is now in the State of Connecticut, in North America, but which was at that time in and part of one of the British colonies of North America, where he Peter Harrison held for many years, and at the time of his death, the office of collector of his Majesty's Customs. Peter Harrison died at Newhaven, in the year 1775, leaving several children him surviving, all of whom, except one daughter, Elizabeth, died during the lifetime of Elizabeth Harrison, without leaving any issue of their bodies them surviving. Elizabeth, the daughter of Peter Harrison, on the 22nd day of October, 1781, was married at Newport, in the State of Rhode Island, in North America (which State of Rhode Island was at that time one of the British colonies) to James Ludlow, who was born before the year 1776 in the State of New York, which State was also, at the time of the birth of James Ludlow, one of the British colonies. James Ludlow was originally brought up to the profession of the law. Elizabeth Ludlow died in the United States of America, in the year 1790, leaving at the time of her death one daughter only, namely, Frances Mary, now the wife of the said P. Thomas, her

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surviving. The said Frances Mary was born at Newport, in America, in the State of Rhode Island, on the 4th day of February, 1784, after the United States of America were recognised as free, sovereign, and independent States, as herein-after mentioned; and was married at New York, in the State of New York, one of the United States of America, to \*P. Thomas, in the year 1807. The colonies of Connecticut, Rhode Island, and New York, with other colonies in North America, separated themselves from the Government and Crown of Great Britain, and united themselves together, and on the 4th day of July, 1776, declared themselves free and independent States, by the name and style of the United States of America. On the 3rd day of September, 1783, his late Majesty acknowledged the United States of America to be free, sovereign, and independent States, and on the same 3rd day of September, a definite treaty of peace was signed, between his said Majesty and the United States of America, which treaty is as follows:

Article 1st. His Britannic Majesty acknowledges the said United States, viz. New Hampshire, Massachusetts Bay, Rhode Island, and Providence Plantations; Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent States; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the government, proprietary, and territorial rights of the same, and every part thereof.

[ \*782 ]

Article 3rd. It is agreed, that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the grand bank, and on all the other banks of Newfoundland, also in the Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind, on such part of the coast of Newfoundland, as British fishermen shall use, but not dry or cure the same on that \*island; and also on the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays,

harbours, and creeks of Nova Scotia, Magdalen islands, and Labrador, so long as the same shall remain unsettled ; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose, with the inhabitants, proprietors, or possessors of the ground.

Article 4th. It is agreed that the creditors, on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money of all *bonâ fide* debts heretofore contracted.

Article 5th. It is agreed that Congress shall earnestly recommend it to the Legislatures of the respective States, to provide for the restitution of all estates, rights, and properties, which have been confiscated, belonging to real British subjects, and also of the estates, rights, and properties of persons resident in districts in the possession of his Majesty's arms, and who have not borne arms against the said United States ; and that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested, in their endeavours to obtain restitution of such of their estates, rights and properties as may have been confiscated ; and that Congress shall also earnestly recommend to the several States a re-consideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation \*which on the return of the blessings of peace should universally prevail ; and that Congress shall also earnestly recommend to the several States, that the estates, rights, and properties of such last-mentioned persons shall be restored to them, they refunding to any persons who may be now in possession, the *bonâ fide* price (where any has been given) which such persons may have paid, on purchasing any of the said lands, rights, or properties since the confiscation ; and it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment to the prosecution of their just rights.

Article 6th. That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in

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the present war; and that no person shall on that account suffer any future loss or damage either in his person, liberty, or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

[ \*784 ]

Article 7th. There shall be a firm and perpetual peace between his Britannic Majesty and the said States, and between the subjects of the one and the citizens of the other, wherefore all hostilities both by sea and land shall from henceforth cease, prisoners on both sides shall be set at liberty; and his Britannic Majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes, or other property of the American inhabitants, withdraw all his armies, garrisons and fleets from the said United States, and from every port, place, and harbour within the same, leaving in all fortifications the American artillery that may be therein; and shall also order, and cause all archives, records, deeds, and papers belonging to any of the said States or their citizens, which, in the course of the war, may have fallen into the hands of his officers, to be forthwith restored and delivered to the proper States and persons to whom they belong.

The special verdict then stated, that P. Thomas, and Francis Mary his wife, afterwards, to wit, on the 1st day of November, 1821, demised to the said John Doe, the said tenements with the appurtenances in the said declaration mentioned, to have and to hold for the term of seven years thence next ensuing, and fully to be complete and ended in manner and form as the said John Doe hath in that behalf alleged, by virtue of which demise, he, the said John Doe, entered into the said tenements with the appurtenances, and was possessed thereof until the said William Acklam, afterwards, to wit, on, &c., entered, &c. but whether or not upon the whole matter, &c. in the usual form. The case was, on a former day in this Term, argued by

*Tindal* for the plaintiff:

In order to establish the plaintiff's right to recover in this action, it will be necessary to make out three propositions.

1st. That all persons born within the colonies of North America whilst subject to the Crown of Great Britain, were natural born subjects to all intents and purposes, and therefore capable to inherit and hold lands in Great Britain.

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2nd. That the separation of the colonies from the parent State, and the acknowledgement of their \*independence, did not in any manner affect the character and capacity of those persons who had been born within the colonies before such separation, as natural born subjects of this kingdom; but that they continued capable to inherit and hold lands in Great Britain as before.

[ \*785 ]

3rd. That by virtue of the 25 Ed. III., or the 7 Ann. c. 5, explained by 4 Geo. II. c. 21, persons born within the United States of America, since their independence has been acknowledged, have the same right to inherit and hold lands as their parents who were born before that time.

The first proposition is so clear, that it is rather to be assumed than to be argued: (this was conceded on the other side). Then James Ludlow the father, and Elizabeth Harrison the mother of Mrs. Thomas, were natural born subjects of Great Britain, able to purchase, hold, inherit, and transmit lands.

The question upon the second proposition is simply, whether persons born in the colonies before the separation did, in consequence of the separation, become aliens, and thereby incapable to hold or inherit lands in Great Britain; for alienage is the only incapacity now in question. That they did not become aliens, will be made clear by the arguments arising from the situation of the parties at the time when the independence of the colonies was acknowledged; secondly, by the language of the treaty containing that acknowledgment, subsequent treaties and various Acts of Parliament sanctioning those treaties; and, lastly, by authorities in the books. And here it may be observed, that the affirmative of alienage lies on the other side. Mr. Ludlow was a natural born subject, it is sufficient for the plaintiff to shew that he was *natus ad fidem regis*, it is for the defendant \*to make out that he became an alien. The situation of the parties at the end of the war does not furnish any reason for supposing that this country intended to make all the inhabitants of the United States aliens. It would have destroyed whatever

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hopes of a reconciliation and reunion were then entertained. Neither could the Americans have any object in becoming aliens. Many of them held lands in this country at the beginning of the war ; they were natural born subjects, as such had various privileges, and they revolted because they considered that some of those privileges had been violated. It cannot therefore be supposed that they would be anxious to abandon any of them. There was nothing in the claim of their independence by which they could be rendered aliens, they could not of their own accord, and by their own act throw off their allegiance, "*nemo potest exuere patriam.*" Again, many individuals adhered to the parent state ; would they become aliens ? If so, it must be on the ground that the whole nation, and therefore every individual of the nation became alien. Now, the nation could only be separated from this country by one of three modes, by cession, by conquest, or by voluntary separation acknowledged and sanctioned by the Legislature. If the Crown cedes a colony, that will not convert into aliens those who were before natural born subjects, and deprive them of the privileges to which, as such, they were entitled. When Florida was ceded to Spain, did those inhabitants who held lands here become liable to lose them upon office found, or would they be incapable of transmitting them to their heirs ? If not, it is clear that cession alone does not make the inhabitants of a colony aliens. Neither can they be rendered aliens by conquest, for \*if they cannot of their own accord put off their allegiance, and if cession by the Crown cannot have that effect, it would be singular if they could be rendered aliens by the violent act of a third power. This point will be made more clear by considering hereafter the history of the possessions which the Crown of England formerly enjoyed, lying on the continent of Europe. But it will be contended, that where a colony renounces its obedience and separates itself from the parent State, by which its independence is afterwards acknowledged, there the allegiance is at an end. There is not, however, any authority for that position, it must be rested on general principles, and be established by arguments *ab inconvenienti* ; such as the difficulty of owing a double allegiance, and the necessity of contending that all the Americans will be traitors who at any

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future time may carry arms against this country. As to the first, *Calvin's case*† shews that a double allegiance may be due, a man may be “*ad fidem utriusque regis*,” and there are many instances, of such an allegiance put in 1 Hale’s P. C. 68. As to the other it is sufficient to answer, that it cannot affect the question of law, for if inconveniences necessarily follow out of the law, only the Parliament can cure them, dict. per VAUGHAN, Ch. J. in *Craw v. Ramsay*.‡ The situation of the parties at the time when the separation of the colonies took place, shews then that the Americans were not thereby rendered aliens, and the same appears by the several treaties made with them, and the Acts of Parliament by which those treaties were recognized. The first article of the original treaty simply declares the United States free and independent.

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It is a relinquishment on the part of the Crown of all claim to government, proprietary, or territorial rights; but it is confined to soil and territory, which are thereby made foreign. The King, by the treaty, gave something to the States, but did not take any thing from them. The treaty made the nation foreign; that the King had power to do. It did not affect to make the inhabitants personally aliens; that he had no power to effect.

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The fifth is the next important article; it contains a direct recognition, by the contracting parties on either side, that the subjects of each State should hold lands in the other. It would have been absurd to restore lands if they could not afterwards be holden. So also it must apply to lands afterwards purchased, and not merely to those which they then held, for a man could not be alien as to part and not as to the residue.

The 6th article provides that no loss or damage should be sustained in person, liberty, or property by reason of the part taken in the war; but surely to be rendered incapable of holding, inheriting, or transmitting lands would be a damage within the meaning of that article. Eleven years after the making of that treaty, a commercial treaty was made; by the ninth article of which it appears, that Americans then held lands in the British dominions, and might transmit them to their heirs, they were therefore considered as British born subjects for

† 7 Co. Rep. 1.

‡ Vaugh. 274.



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that purpose. This treaty is recognised and confirmed by the 37 Geo. III. c. 97, s. 24, which recites and applies to the article in question.

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This view of the question is corroborated by several cases, bearing in some degree on the point. The very definition of alien given in Litt. s. 198, "born out of the liegance of our sovereign lord the King," shews that the \*place of the birth is not conclusive as to alienage. Lord COKE, in his commentary on that passage† says, "Note here, Littleton saith not *hors del realme* but *hors de legiance*, for he may be born out of the realm of England yet within the legiance." This shows that Mr. Ludlow and his wife were natural born subjects, and that character, once acquired, is indelible; no authority save an Act of Parliament is sufficient to destroy it, for that alone can naturalise one born an alien. In *Calvin's case*‡ a difficulty was put as possible in the event of a separation of the crowns of England and Scotland; but Lord COKE says, "albeit the kingdoms should, by descent, be divided and governed by several Kings, yet it was resolved that all those that were born under one natural obedience, while the realms were united under one sovereign, should remain natural born subjects, and no aliens, for that naturalization due and vested by birthright cannot, by any separation of the crowns afterwards, be taken away; nor he that was by judgment of law a natural subject at time of his birth become an alien by such a matter *ex post facto*." The case of the provinces of Gascoyne, Guienne, Anjou, is decisive to shew that the subjects of them were natural subjects, for the purpose of inheritance, not only during the time when they formed a part of the dominions of the Crown, but afterwards when they were conquered by France. Those provinces came to Hen. II. by different titles. They were all lost in the reign of King John, and many of the principal persons in them adhered to the French King. The English estates of those persons were confiscated, but the people in general were still inheritable of lands in \*England, and were accounted "*ad fidem utriusque regis*." The 17 Ed. II. stat. De Prærog. Regis was passed to give to the King escheats of the lands which descended to persons born beyond the sea, whose

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† Co. Lit. 129, a.

‡ 7 Co. Rep. 54.

ancestors were, from the time of King John, under the allegiance of the Kings of France; Staunford, *De Prærog. Regis*. During the interval between the loss of those provinces and the statute in question, there must have been several generations, yet still the descendants must have been considered inheritable. Then, thirdly, the children born, after the separation of the two countries, of American parents born before that time, are natural born subjects. The 25 Ed. III. expressly provides for such a case, and that is only declaratory of the common law according to *Hussey, J.* in 1 Ric. III. 4. But even if it be doubtful whether that statute extends to the present case, the 7 Ann. c. 5, s. 3, explained by the 4 Geo. II. c. 21, certainly applies to it. A question will be made on the words used in that Act, "at the time of the birth," and it will be urged that the parents of the lessor of the plaintiff, Mrs. Thomas, had not that character at the time of her birth. It is certainly difficult to ascribe any definite meaning to those words, for it has been shewn that a natural born subject must continue so, he cannot put off that character. The 4 Geo. II. c. 21, was extended to grandchildren by the 13 Geo. III. c. 21.† The case of *Stewart v. Hume*‡ is a decision in favour of the plaintiff. In 1791 Anne Stewart, widow of George Stewart, claimed her terce of lands in Scotland. G. S. and his wife were born in America, before the revolt of the colonies, and continued to reside there afterwards. It was objected that she thereby became an alien, and therefore could not claim her terce; \*but the Lord Ordinary held, that the claimant having been born before the revolt of the colonies was to be considered as a subject of Great Britain, residing then in a foreign country. *Gordon and Scott v. Brown*, (decided in 1810, but not reported,) is also in point: in that case Brown, the son and heir of the person last enfeoffed, was born in America, after 1783, and was held entitled to the land. In *Shedden v. Patrick* § the same point was involved, but the Court of Session appeared to entertain no doubt about it, the whole question there turned

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† The effect of these Acts was much discussed in *De Geer v. Stone* (1882) 22 Ch. D. 243, 52 L. J. Ch. 57.—R. C.

‡ 6 *Morrison's Dict. of Decisions*, 4649.

§ *Morrison's Dict. of Decisions*.

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upon the illegitimacy of the claimant. Applying to this case the observation of Lord HALE, in *Collingwood v. Pace*,† “The law of England, which is the only ground, and must be the only measure, of the incapacity of an alien, and of those consequential results that arise from it, hath been always very gentle in the construction of the disability, and rather contracting it than extending it so severely,” the Court will be fully justified in giving such a construction to those statutes, and to the doctrine of alienage in general, as will support the claim of the present lessors of the plaintiff.

*Parke*, for the defendant :

Mrs. Thomas, the lessor of the plaintiff, was not a natural born subject, and therefore cannot be entitled to the lands in question. In *Calvin's* case it is said, that there are three incidents to a subject born ; first, that the parents be under the actual obedience of the King ; second, that the place of his birth be within the King's dominion ; and thirdly, at the time of his birth the Kingdom where he is born must be under the legiance of the King. The first two of these incidents shew, that at common law Mrs. T. \*would be an alien, unless under certain special circumstances. It is clear, that at the time of the birth of Mrs. T., that being after the ratification of the treaty of 1783, the United States were independent of this country, *Folliott v. Ogden* ; † and, therefore, unless her case falls within the 25 Ed. III. st. 2, the 7 Ann. c. 5, or 4 Geo. II. c. 21, she is clearly an alien. Now the statute 25 Ed. III. s. 2, which is a declaratory Act, says, “ that the children born without the legiance of the King, whose fathers and mothers at the time of their birth shall be at the faith and legiance of the King, shall have the same privileges as if born within the legiance of the King.” Clearly the father and mother, in this case, were not at the faith and legiance of the King at the time when Mrs. Thomas was born. The 7 Ann. c. 5, s. 3, says, “ that the children of all natural born subjects born out of the legiance of her Majesty, shall be deemed natural born subjects.” Some doubts having arisen upon

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† 1 Ventr. 427.

† 2 R. R. 736 (1 H. Bl. 124 ;  
3 T. R. 726).

the construction of that enactment, the 4 Geo. II. c. 21, was passed to remove them, and declared, “that the children were to be deemed natural born subjects only, where the parents, at the time of the birth of the children, should be natural born subjects. That statute shews, that, in the opinion of the Legislature, the character of a natural born subject might be lost. The doctrine of allegiance proceeds on the ground of a mutual compact between the Crown and the subject: *Calvin’s case*;† and it is clear that it cannot be dissolved by either party without the concurrence of the other; but that may be done by the mutual consent of both parties; and here, the act of the sovereign was authorised by Act of Parliament, 22 Geo. III. c. 46. The first article of the treaty \*is a complete renunciation of all authority on the part of the Crown of Great Britain; on the side of the colonies a claim of freedom from allegiance. Mr. Ludlow, by remaining in America after the treaty, lost his character of a British subject. This was urged by Lord REDESDALE, when arguing the case of *Somerville v. Somerville*,‡ and was not denied, either by the counsel on the other side or by the Court. The subsequent provision giving to the Americans a qualified right of fishing, proves that it was so understood; for had they remained subjects of the King of Great Britain, that clause would have been unnecessary. The clauses for the restoration of property are merely exceptions from that which would otherwise have followed from the first article, and do not treat the Americans and their heirs as capable of holding lands in the character of natural born subjects. The consequence of deciding for the plaintiff would be, that all Americans must be considered as subjects, with all their privileges and duties. There may be instances in which persons may be entangled in a double allegiance; but the inconvenience is so great, that the Court will not be inclined to favour the doctrine of a double allegiance. The case supposed in *Calvin’s case*, of a separation of the crowns of England and Scotland, is a separation by operation of law, without any dissolution of the compact by the consent of the parties. This case has already been decided in the American Courts, where it has been held, that the natives of Great Britain

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† 7 Co. Rep. 9.

‡ 5 R. R. 155 (5 Ves. 750).

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are aliens, and incapable of inheriting lands in that country :  
*Blight's Lessee v. Rochester.*†

*Cur. adv. vult.*

[ 794 ]      The judgment of the COURT was now delivered by

ABBOTT, Ch. J. :

This was an ejectment, brought for the recovery of certain lands in the county of York, whereof Elizabeth Harrison had lately died seised. Frances Mary Thomas claimed as heiress at law, and according to the pedigree, she is entitled so to claim, if she be a person capable of claiming lands in England by descent. She is the daughter of Elizabeth Harrison, afterwards Ludlow, and granddaughter of Peter Harrison. Peter, the grandfather, a native of England, went to America, and resided for many years in Connecticut, where he held the office of collector of his Majesty's Customs, and died in 1775. His daughter Elizabeth was married in 1781, in Rhode Island, to James Ludlow, a native of New York, who was born before the year 1776, and who continued to live in America until his death, and died there ; Elizabeth also continued to live in America, and died there in 1790. Frances Mary was born in America, in Rhode Island, in 1784. The question is, whether she be the child of a father, who, at the time of her birth, according to the expression used in the statute 4 Geo. II. c. 21, was a natural born subject of the Crown of Great Britain.

The case was very ably argued before us, and all the authorities bearing on the question were cited ; we do not think it necessary to refer again to them.

Some question was raised as to the meaning of the words, " fathers, natural born subjects of the Crown of Great Britain, at the time of the birth of their children." We think the sense of these words is very plain ; natural born subjects are mentioned as distinguished from subjects by donation, or any other mode. A child born out of the allegiance of the Crown of England is not entitled \*to be deemed a natural born subject, unless the father

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† Wheaton's Reports of Cases in the Supreme Court of the United States, 535.

be, at the time of the birth of the child, not a subject only, but a subject by birth. The two characters of subject and subject by birth, must unite in the father. James Ludlow, the father of Frances Mary, was undoubtedly born a subject of the Crown of Great Britain; he was born in a part of America which was at the time of his birth a British colony, and parcel of the dominions of the Crown of Great Britain; but upon the facts found, we are of opinion, that he was not a subject of the Crown of Great Britain, at the time of the birth of his daughter. She was born after the independence of the colonies was recognised by the Crown of Great Britain; after the colonies had become united States, and their inhabitants generally citizens of those States; and her father, by his continued residence in those States, manifestly became a citizen of them. This recognition of independence was made, or rather confirmed, on the 3rd of September, 1783, by a treaty between his late Majesty and the United States of America. Preliminary articles, which are afterwards introduced into, and form this treaty, were signed on the 30th November, 1782, after the passing of the statute 22 Geo. III. c. 46, whereby his Majesty was authorised to treat of and conclude a peace or truce with the several American colonies therein named. Between the signing of the articles and of the definite treaty, several Acts were passed, mentioning the United States of America, and the subjects and citizens of those States: and the name of colonies or plantations is no longer used. Many Acts of Parliament, wherein the United States of America are mentioned and treated as a distinct and independent nation, have been since passed; so, that if \*the sanction of the British Legislature could be thought necessary to give validity to this treaty, such sanction has been abundantly given.

Then what is the effect of this treaty, as it regards the question in the present cause? By the first section, his Majesty acknowledges the United States of America, (enumerating by name, as those States, the several countries that had been before, in all Acts of Parliament, mentioned as colonies or plantations,) to be free, sovereign, and independent States, that he treats with them as such, and relinquishes all claim to the government, proprietary, and territorial rights of the same, and of every part thereof.

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It is impossible to yield to one of the observations made by the learned counsel for the plaintiff, that this is to be considered as a relinquishment of the right to the soil or territory only; a relinquishment of the government of a territory, is a relinquishment of authority over the inhabitants of that territory; a declaration that a State shall be free, sovereign, and independent, is a declaration that the people composing the State shall no longer be considered as subjects of the sovereign by whom such a declaration is made. It was contended, however, that by some of the subsequent articles of this treaty, or by the subsequent treaty, which was ratified by the statute 37 Geo. III. c. 97, it appears that persons in the situation of the lessor of the plaintiff are to be considered as the children of natural born British subjects, and not as the children of aliens. But we think no such effect can be derived from either of these treaties. The third, fifth, and sixth articles of the treaty of 1783, appear to be the only articles that have any bearing upon this question. The third article gives to the citizens of the United States a liberty of fishing \*on certain coasts. On the part of the defendant it was said, that if they were to be considered as British subjects, they would have this privilege in that character. At all events, it is clear that a liberty thus specially given confers no right beyond that which is so given.

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By the fifth article it is agreed, that Congress shall recommend to the legislatures of the respective States to provide for the restitution of confiscated estates belonging to real British subjects, &c., that persons of every description shall have liberty to go into any part of the United States, and remain twelve months, to endeavour to obtain restitution of their estates. The sixth article provides against future confiscations, by reason of the part that any person may have taken in the war. Now it is impossible to extend the effect of these two articles beyond the particular lands that might be restored, recovered, or retained in virtue of them; and their effect, even as to such lands, with the future residence of their owners, and the rights of descent are not clearly defined. Then, as to the subsequent treaty; it provides only that British subjects who then held lands in the territory of the United States, and American citizens, who then

held lands in the dominions of his Majesty, should continue to hold them, and might grant, sell, or devise them, as if they were natives, and that neither they nor their heirs or assigns should, so far as might respect the said lands, and the legal remedies incident thereto, be considered as aliens. This article is therefore, in terms, confined to lands then held; in its general import, it distinguishes British subjects from American citizens; and the provision that persons should not be considered as aliens, with regard to particular lands, seems to indicate very plainly, that they were considered as aliens \*with regard to other lands. The inconvenience that must ensue from considering the great mass of the inhabitants of a country to be at once citizens and subjects of two distinct and independent States, and owing allegiance to the government of each, was well commented upon in the argument at the Bar. If the language of the treaty could admit a doubt of its effect, the consideration of this inconvenience would have great weight toward the removal of the doubt. As we think the effect of the treaty manifested by its language, we do not think it necessary to observe upon this topic. But, for the reasons already given, we are of opinion, that James Ludlow had ceased to be a subject of the Crown of Great Britain, and became an alien thereto, before the birth of his daughter, and, consequently, that she is also an alien, and incapable of inheriting land in England; and judgment must be entered for the defendant.

It is a great satisfaction to us to know that this our judgment is conformable to a decision of the Supreme Court of the United States of America upon a similar question, brought before that Court on a claim of a British subject to land in America.

*Judgment for defendant.*

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1824.  
May 31.

# SIMONDS AND LODER v. WHITE. †

(2 Barn. & Cress. 805—813; S. C. 4 Dowl. & Ry. 375; 2 L. J. K. B. 159.)

[ 805 ]

A loss by general average is to be calculated between the owner of ship and the owner of goods according to the law of the port of discharge.

ASSUMPSIT for 106*l.* 3*s.* 6*d.*, as money paid by the plaintiffs to the use of the defendant. At the trial before Abbott, Ch. J., at the London sittings after Hilary Term, 1823, a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case:

[ \*806 ]

The plaintiffs are British subjects, having a mercantile establishment in London where Simonds resides, and at Saint Petersburg where Loder resides, under the permission of the Russian Government. The defendant is also a British subject, and the owner of the British ship *Mamhull*, which was chartered at Gibraltar on the 15th \*of March, 1820, by W. Cozens & Co., who are British subjects residing at Gibraltar, for a voyage from Gibraltar to touch at the Isle of Wight for orders, and then to proceed immediately, if so directed, to Saint Petersburg. The vessel sailed on the voyage from Gibraltar on the 20th of March, 1820, with a cargo on board, for which bills of lading were there signed in the following form deliverable at Saint Petersburg. "Shipped in good order and well conditioned by W. Cozens & Co., in and upon the good ship called the *Mamhull*, now riding at anchor in Gibraltar bay, and bound for Saint Petersburg, (enumeration of the goods and their marks, weights, &c. here follow,) being marked and numbered as in the margin, which are to be delivered in like good order and well conditioned at the aforesaid port of Saint Petersburg (the dangers of the sea only excepted), unto or assigns, (afterwards filled up unto M. W. Simonds & Co., (the plaintiffs,) or their assigns,) he or they paying freight for the said goods as per charter party, with tonnage and average accustomed."

† Cited in the judgment of the Exchequer Chamber in *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115, 126, 35 L. J. Q. B. 74, 78; in judgment of Sir R. PHILLIMORE in *The Patria* (1871) L. R. 3 A. & E. 436, 462; 41

L. J. Adm. 23, 29. See also *Atwood v. Sellar* (1879) 4 Q. B. D. 342, 349; 5 Q. B. Div. 286; 49 L. J. Q. B. 515; *Huth v. Lamport* (1885) 16 Q. B. Div. 735, 55 L. J. Q. B. 239.—R. C.

On the arrival of the vessel at the Isle of Wight, the plaintiffs purchased the cargo from the agents of Cozens & Co., and the ship afterwards proceeded on to Saint Petersburg. In the course of the voyage she struck on a reef of rocks off the island of Lessoe, when the long boat was got out, and the small bower cable and anchor were carried out to endeavour to get her off, but the tide being strong it drifted the vessel on to the cable which was thereby rendered useless and unfit for service. Assistance was procured, and the vessel got off, she put into Elsinour, where the master purchased a new cable, and the vessel finally completed the voyage and delivered the cargo in safety under the aforesaid bill of \*lading. When the vessel arrived at Saint Petersburg, a statement of general average on the voyage, according to the Russian laws upon that subject, was made up and settled by an officer appointed for that purpose by the Russian Government, called the Dispaheur. In that statement was included as a charge upon the cargo for general average, the sum of 106*l.* 3*s.* 6*d.* for the cost of the new cable beyond the old one, surveying the old cable, weighing and getting the new cable on board, the duty payable on the foreign cable when brought into England, and the new cable's proportion of the above charges, which are admitted to be general average according to the laws of Russia; and the plaintiffs were called upon to contribute to the general average so calculated, and by the laws of Russia they were obliged to pay the sum demanded in order to get possession of the cargo. The cargo of the *Mamhull* was insured by a policy effected in London, the underwriters upon which refused to allow the cable and the charges connected with it as part of the loss. On the 21st of February, 1821, the plaintiff, Simonds, wrote a letter to the defendant demanding payment of the said sum of 106*l.* 3*s.* 6*d.* The case was argued in the last Term, by

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*F. Pollock* for the plaintiff :

The general average ought to have been calculated according to the laws of England and not according to the laws of Russia, and the defendant having claimed and received the money on grounds not tenable, and the plaintiffs having been compelled to

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pay it in order to obtain their goods, the sum so paid may be recovered back in an action for money had and received. The question is to be decided on the same principle as if the defendant was now \*suing for average in an English Court of Justice. All the parties to the contract were British subjects, and the ship was a British ship. In *Power v. Whitmore*,† it was decided that the insurer of goods shipped to a foreign country was not bound to indemnify the assured, a subject of that country, against general average, which by a decree of a court there he was obliged to pay, but which, by the law of this country, he was not liable to pay; and Lord ELLENBOROUGH in that case says, that “the contract must be governed in point of construction by the law of England, unless the parties have contracted on the footing of some other known general usage among merchants relative to the same subject.” The accident in this case happened before the vessel reached the Russian dominions, and it ought to be considered with reference to this question in the same light as if it had happened in the river Thames, and then it is quite clear that the average must have been calculated according to the law of this country. In this case it does not appear that when the vessel left Gibraltar, it was settled that she was to go to Saint Petersburg as the place of her final destination; she was only to go there if so directed.

*Whateley, contra :*

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The decision in *Power v. Whitmore*† does not govern the present case. The question there arose upon a policy of insurance, an instrument in general and familiar use, and of known meaning in England, and upon a contract which could only be enforced in this country. Here the question arises upon a bill of lading, and the payment of average, if any should become \*due, is implied by the general law merchant. In that case too, the question arose between the underwriter and the owner of the goods; in the present, it arises between the owner of the ship and the consignee of the goods, and the rights and liabilities of the one are very different from the rights and liabilities of the other. In that case it was not stated, that the average was

† 16 R. R. 416 (4 M. & S. 141).

settled according to the law of the place where the adjustment was made; in the present case it is so stated. Now it is quite clear, that by the general law and custom of merchants, as appears by the most celebrated works on marine law of this and other countries, that the master of a ship has a lien upon the goods at the port of discharge for any average which may become due during the voyage: *Consulat de la Mer*, Paris edition, 1808, section 225; *Complete Body of Sea Laws*, section 33, article 31; *Wellwood's Abridgement of Sea Laws*, edition 1613, tit. 21, page 47; *Bynkershoek, Questiones juris Privati*, liber 4, c. 24; *Malyne's Lex Mercatoria*, 3rd edition, page 113; *Beawes's Lex Mercatoria*, edition 1813, tit. Average, p. 245; *Ordinance of Lewis the Fourteenth*, book 3, tit. 8; *Du Jet*, article 21; *Abbott on Shipping*, 257. The parties, therefore, in this case, must be supposed to have contracted upon this understanding. And if the master has a lien at the port of discharge, it seems to follow as a necessary consequence, that the average must be calculated and adjusted according to the law which prevails there, for it would be absurd to suppose that he can have a lien at the port of discharge for average which is to be calculated according to the law of another country. In this case the bill of lading mentions that the vessel is bound to Petersburg, and it was therefore known to the parties to the contract, that if an average loss occurred upon the voyage, it must be adjusted at that place.

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*Cur. ad. vult.*

ABBOTT, Ch. J., now delivered the judgment of the Court :

The question in this case is, whether the plaintiffs, the proprietors of certain goods carried on board the defendant's ship from Gibraltar to Petersburg, and who were compelled at Petersburg to pay to the defendant, in order to obtain possession of their goods, a sum of money as a contribution to a general or gross average, settled at Petersburg according to the law of Russia, can recover back so much of the money thus paid, as would not have been charged to them on an adjustment of average made according to the law of England, the ship being a British ship, and all the parties British subjects. And we are all of opinion that the plaintiffs cannot recover back this money.

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On the part of the plaintiffs it was contended, that the case must be considered exactly as it would be if the defendant were now suing for average in a British court. The authority cited for the plaintiffs, is the case of *Power v. Whitmore*. That case, however, cannot govern the present for two reasons; first, because it arose between different parties, and on a different species of contract, namely, a policy of assurance. And, secondly, because in the opinion of the Court, the facts there stated did not shew that the average had been adjusted according to the established law and usage of the country wherein the adjustment was made: whereas the present case arises between a shipper, or rather his assignee and \*the ship owner, and it is an admitted fact that the average was adjusted according to the law of Russia.

[\*811]

The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument, as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract, as between the parties to the contract: but there is nothing of that kind in any contract between the parties to this cause. There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle. But in one point all agree; namely, the place at which the average shall be adjusted, which is the place of the ship's destination or delivery of her cargo. I believe also, that all are agreed on another point; namely, that the master is not compellable to part with the possession of goods until the sum contributable in respect of them, shall be either paid or secured to his satisfaction. This appears by the case to be the law of Russia. This power is noticed in the civil law: Dig. lib. 14, tit. 2, 2. It is expressly given in the Consulat, c. 98, recognised by Cleirac in his commentary on the Jugemens d'Oleron, p. 85, and allowed by the French Ordinance of Marine, tit. Du Jet. art. 21. If then the average is to be adjusted at the place of destination, by what law shall it be adjusted?

One may suppose the case of a British ship carrying to a foreign port the goods of British subjects only, and \*delivering them to British subjects there. But such a case will rarely occur: some, at least, of the consignees of the goods will usually be foreigners. The present is not found to be a case of that singular description, and must therefore be taken to be of the usual kind. And where there are several shippers, even if all are British subjects, it will, in the case of jettison, be for the interest of the person whose goods have been lost, that the master should exercise his power of detention in order that the expense and inconvenience, and delay of actions and suits may be avoided. And if, as in the present case, the original loss has fallen upon the ship, the master *may* certainly exercise that power for his own safety, which, in other cases, he ought often to exercise for the safety of other persons. Now, if the goods belong entirely to the persons of the nation where the ship has arrived, they cannot with any reason complain of an adjustment made under the authority of their own law. In such a case it would hardly be contended, that as between them and the master, or between some and others of them, the adjustment ought to be regulated by any other law than their own. Then suppose, which will perhaps be the most usual case, that the goods belong to persons of different nations, the adjustment must be made either according to some one law regulating the whole, or it must be made in parts, according to as many different laws as there happen to be persons of different nations concerned in the adventure. The latter mode would be attended with great confusion, perplexity, and inequality, even if it should be found practicable, which in many cases it would not be. In this case also, therefore, the law of the country must prevail. And this will not impugn any known doctrine \*or rule of the English law. The shipper of goods, tacitly, if not expressly, assents to general average, as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average, he must be understood to assent also to its adjustment, and to its adjustment at the usual and proper place; and to all this it seems to us, to be only an obvious

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[ \*812 ]

[ \*813 ]

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consequence to add, that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made. I am to be understood as speaking of a case depending upon general rules and reason, and not upon a special or particular contract. It is of infinite importance to maritime commerce, that its regulations should be as simple and as few in number as general justice will permit. The wisest and most equitable rules may occasionally, in a particular case, be productive of an inconvenience, but such occasional and particular inconvenience is a much less evil, than the confusion and uncertainty that never fail to accompany a multiplicity of minute regulations. For these reasons we are of opinion that the defendant is entitled to our judgment.

*Judgment for the defendant.*

1824.

[ 821 ]

**WILLOUGHBY v. BACKHOUSE AND MARSHALL.†**

(2 Barn. & Cress. 821—824; S. C. 4 Dowl. & Ry. 539; 2 L. J. K. B. 174.)

Where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action by entering into an arrangement with him respecting the sale of the goods seized.

**CASE** for an excessive distress. Plea, not guilty.

At the trial before *Bosanquet*, Serjt., at the last Summer Assizes for Buckinghamshire, the following facts appeared in evidence: The plaintiff occupied a farm belonging to the defendant, Backhouse, and on the 26th of September, 1822, the other defendant Marshall, as agent for Backhouse, distrained for 175*l.* which was then due for rent, and seized all the live and dead stock on the farm, and the household furniture, goods, and chattels on the premises, to the value of 1,000*l.* On the same day the plaintiff executed the following agreement. “To Mr. T. Marshall. You having, as the agent of T. J. Backhouse, Esquire, this day entered a distress on my effects, at Haverfield Lodge for the sum of 175*l.* rent, which you claim to be due from me to the said T. J. Backhouse, at Lady-day last, I hereby authorise and empower you to hold possession

† Cited by POLLOCK, B., in *Roe v. Mutual Loan Association* (1887) 56 L. T. 631, 633.—R. C.

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of the same effects until the 15th day of October next, or until such other period subsequent to the expiration of the five days mentioned in your notice of distress as you may think proper ; and I also authorise and empower you to convert the same effects into money, by the sale and disposition thereof, either by public sale or private contract, and at such time as you may think expedient. And I authorise you to dispense with the form of appraisement required by law in the case of a sale under a distress for rent, and to make such public or private sale without \*any such appraisement. And I also authorise and empower you, from the produce of the said effects, to pay or retain as well the said sum of 175*l.*, as also the further sum of 125*l.* which, on the 29th of September instant, will, according to your claim, have become due for a further half-year's rent, making altogether the sum of 300*l.* together with the costs of distress and of such sale and disposition, subject to such reduction as, by the agreement entered into between us, I am entitled to upon quitting possession of the premises in my occupation, for the amount of the outgoing valuation, so that such valuation be completed before the sale of my said effects." On the 30th of September Marshall made another distress for 125*l.* which became due on the 29th, and again seized all the property on the farm, subject to the former distress. Before either of the distresses the plaintiff had made preparations for leaving the farm, and had advertised a sale of his effects. In order that the sale should not be prejudiced it was agreed between him and Marshall, that the sale should proceed according to the original intention, and not as a sale under a distress, and that the landlord should be satisfied out of the proceeds, which agreement was carried into effect. The learned Judge told the jury that there were two questions for their consideration, first, whether the distress was excessive, of which he said there could be no doubt: secondly, whether the agreement, signed by the plaintiff on the 26th of September, was an acquiescence on his part in that which had been done by Marshall. That if they thought it was, it was an answer to the action. The jury having found a verdict for the defendants, *Cooper*, in Michaelmas Term obtained a rule for a new trial, on the ground that the direction of the learned \*Judge

[ \*822 ]

[ \*823 ]



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was not correct in point of law, for that the agreement was not any waiver of the right of action created by the wrongful seizure of the property.

*Storks* and *Dover* now shewed cause, and contended, that it must be taken upon that agreement, together with the other circumstances proved respecting the actual sale of the property, that the plaintiff was a party to the whole transaction; that he ratified the whole *ab initio* and therefore could not afterwards complain that it was wrongful. If so, the verdict found under the direction of the learned Judge was right.

*Cooper, contra*, was stopped by the COURT.

BAYLEY, J. :

This is a very plain case. When a landlord is about to make a distress he is not bound to calculate very nicely the value of the property seized; but he must take care that some proportion is kept between that and the sum for which he is entitled to take it. Now, here the rent in arrear, at the time of the first distress was 175*l.*, and the goods seized were worth 1,000*l.*, the distress, therefore, was clearly excessive, and upon the seizure being made a right of action was vested in the plaintiff. Was that right of action destroyed by the agreement made afterwards? It gives no satisfaction to the tenant, he makes no stipulation not to sue for that which had been done. The landlord, indeed, has further power given to him, but I do not find that the tenant receives anything. Such a document is no answer to such an action as the present. [ \*824 ] I think, therefore, that the question was not properly \*left to the jury, and that the rule for a new trial must be made absolute.

HOLROYD, J. :

Whatever effect the agreement in question might have upon the jury when estimating the damages, clearly it does not amount to a satisfaction in law, or a release of a right of action. The plaintiff, therefore, was entitled, upon the evidence, to a verdict in his favor, and there ought to be a new trial.

LITTLEDALE, J. :

The plaintiff does not, by the agreement, profess to waive his right of action. But even if he did, still it would not be a sufficient answer; for a right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done. This rule must, therefore, be made absolute.

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*Rule absolute.*

### CLEMENTI AND OTHERS v. WALKER.†

1824.

(2 Barn. & Cress. 861—871; S. C. 4 Dowl. & Ry. 598; 2 L. J. K. B. 176.)

[ 861 ]

An author publishes his work in a foreign country in 1814, and afterwards agrees to sell to A. the exclusive right of printing the same work in this country, but no agreement or consent in writing was then entered into. A. publishes the work in September, 1814, in England. In 1818, B. publishes the same in England. In 1822, the author, by an agreement in writing, assigns to A. the exclusive right of printing the work in England: Held, that A. did not, by the parol consent given by the author in 1814, acquire the exclusive right of publishing the work in England: secondly, that that could not be deemed a publication by the author, not being made on his account or for his benefit: thirdly, that the publication by B. in 1818, was a lawful publication: and, fourthly, that the author could not afterwards, in 1822, by making a valid assignment to A., enable him to maintain an action against B. for selling a copy of the same work after the assignment was executed.

CASE. The first count of the declaration stated that the plaintiffs, before and at the time of the committing the grievances thereafter mentioned, were the proprietors of the copyright of and in a certain book being a musical composition, called "Vive Henri Quatre," the celebrated national French air, with an introduction and eight variations for the piano forte, first printed and published within fourteen years last past; to wit, at &c. Westminster, in the county of Middlesex, yet that the defendant well knowing the premises, but contriving, &c., theretofore and

† By 7 Vict. c. 12, s. 19, where there has been a first publication abroad, the property is unprotected in England otherwise than by the provisions of the International Copyright Acts. See 49 & 50 Vict. c. 33. Thus the decision in *Clementi v. Walker* has now no direct application. But it may still be useful for purposes

of illustration. The judgment of BAYLEY, J., is cited by Lord BROUGHAM in *Jeffreys v. Boosey* (1854) 4 H. L. Cas. 815, 974, 24 L. J. Ex. 81, 105. As to the dicta at p. 575, there is no doubt that the existing Copyright Acts do not make printing in this kingdom a condition of acquiring copyright.—R. C.

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after the passing of a certain Act of Parliament in the 54 Geo. III., to wit, on the 26th day of January, 1822, and on divers other days and times between that day and the day of exhibiting the bill of the said plaintiffs against the defendant, to wit, at, &c., knowingly, wrongfully, and injuriously, and without the consent of the plaintiffs, so being the proprietors of the copyright of and in such book first had and obtained in writing, printed and caused to be printed, divers, to wit, 2,000 copies of the said book of the plaintiffs, by means whereof the plaintiffs were greatly injured and damnified to wit, at &c. There were other counts for having published and exposed to sale, the same work, &c. At the trial before Abbott, Ch. J., at the Middlesex sittings in \*Hilary Term, a verdict was found for the plaintiffs with nominal damages, subject to the opinion of this Court on the following case :

[ \*862 ]

Mr. F. Kalkbrenner, a foreigner, composed the music in question in France in the summer of 1814. Before he came to England, which he did in June in that year, he agreed with Mr. Pleyel, a publisher of music in Paris, that he should have the right of publishing such music in France only, reserving to himself the right of publication in England. It was not published in France before Mr. Kalkbrenner quitted that country to come to England. On the 17th of June, 1814, there were deposited by Mr. Pleyel, five copies of the musical composition in question, in the dépôt at Paris for entry of copyright in France. It has been published and sold in France up to the present time. Shortly after Kalkbrenner arrived in England, viz. on the 12th of July, 1814, he sold the work in question with two others by a parol agreement for the sum of 30*l.* to the plaintiffs and two other partners since dead, and which sum was then paid to him for the same. A few days after such sale Kalkbrenner returned to France, and then corrected the engraving of the composition for the publication in Paris for Mr. Pleyel, and did not see the work published at Paris till the following year 1815. The plaintiffs first published the composition in England between the 3rd and 10th of September, 1814. At the distance of two years after this, Kalkbrenner was paid by Mr. Pleyel 200 francs, which is equal to about 8*l.* sterling, for the right Kalkbrenner had so sold to him. On the 24th of January, 1822, Kalkbrenner being in England,

executed an assignment in writing of his copyright in the musical composition in question to the plaintiffs, agreeably to the terms of \*sale made by him to them in 1814. The defendant sold a copy of the work in question to Mr. Lindsey on the 20th of February, 1822, at his shop in London, for two shillings. Such copy was on English paper and from an English engraving. The son of the defendant, in 1818, purchased a copy of the composition published by Pleyel at a shop in France, with a number of others by the same author, which the defendant caused to be engraved and published in England, in December, 1818. The defendant's edition was a fac-simile of the copy so purchased by his son, and there was no difference between that edition and the edition published and sold by the plaintiffs in England. There is a register kept at Paris, and by the law of France all musical publications must be registered, and a copy of the said composition was duly registered and deposited there the 17th of June, 1814. The defendant's son never heard or saw the composition until he saw it at the shop in Paris in 1818.

This case was argued on a former day at these sittings, by *Comyn* for the plaintiffs and *Campbell* for the defendant.

For the plaintiffs, it was insisted that they, as the proprietors of the copyright, were entitled to recover. The statute 8 Anne, c. 19,† gave the sole right of printing any book to the author or his assignee for fourteen years, to commence from the day of his first publishing the same. That statute is explained by the subsequent statutes of the 41 Geo. III. c. 107,† and the 54 Geo. III. c. 156.† They were all passed to secure the rights of authors, and ought to be construed most favourably for them. The publication of the work by the plaintiffs in September, 1814, did not confer upon them the exclusive right of printing the same, because there was no consent of \*the author in writing as required by the statute, *Power v. Walker*.‡ But that publication having been made with the sanction of the author, is to be deemed a publication by him at that time, and a subsequent printing of the same work by the defendant was a wrongful

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[ \*863 ]

[ \*864 ]

† Repealed 5 & 6 Vict. c. 45.

‡ 15 R. E. 378 (3 M. & S. 7;  
4 Camp. 8).

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publication of it. The right vested in the author in 1814, and continued in the author until he executed a valid assignment of it to the plaintiffs in 1822; and there being a sale of a copy of the work after that period by the defendant, a good right of action thereby accrued to the plaintiffs.

For the defendant, it was contended that there having been a previous publication of the work in a foreign country by the assent of the author, he could not afterwards claim the exclusive right of publishing it in this country. It was true, that in *Edgeberry v. Stephens*,† a patent for a thing practised beyond seas was held good, but that case turned upon the words of the statute, 21 Jac. I. c. 8, which authorised the granting of patents, for the working of any new manufacture, to the first and true inventor. By the statute of Anne, the exclusive right is given to the author for a term to commence from the time of his first publishing the same. All the statutes upon this subject contemplate a work published for the first time in England. The provisions in the 8 Anne, c. 19, s. 2,‡ requiring the copy of all books thereafter to be published to be entered at Stationers' Hall, and copies to be delivered there, as well as the clauses giving power to the Archbishop of Canterbury and other great officers of state to settle the prices of \*books, all shew that the Legislature contemplated a work published for the first time in England. Sec. 7 enacts, that the Act shall not extend to prevent the importation of any book printed in Greek, Latin, or any other language beyond the seas. From that section it appears, that any book already printed beyond the seas may be imported and sold here, and if that be so, why should it not be reprinted here? The reprinting would give employment to British industry and capital. The 12 Geo. II. c. 36,§ prohibits the importation of books originally composed and printed here and afterwards reprinted abroad, but it does not prohibit the importation of books published abroad in the first instance. The author in this case, by once publishing his work in France, dedicated it to the public, and cannot afterwards claim an exclusive copyright in this country. Suppose the work had been published abroad for fifty

† 2 Salk. 447.

§ Repealed S. L. R. Act, 1867.

‡ Repealed 5 & 6 Vict. c. 45.

years, and some person had reprinted it here, surely the author after such a lapse of time could not for the first time claim the work, reprint it, and then bring an action against the party who had reprinted it here. The plaintiffs acquired no right until 1822. The defendant had before that time published the work here. That was a lawful publication, for he might at that time have imported any number of copies printed in France. Having once published, it was not competent to the author after such a lapse of time to claim the exclusive right of publishing in this country.

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*Cur. adv. vult.*

BAYLEY, J. now delivered the judgment of the Court, and after stating the facts of the case proceeded as follows :

The first question in this case is, whether the publishing of the work, in September, 1814, gave to the plaintiffs the privileges conferred upon authors by the Legislature, and we are of opinion that it did not, because there was not any assignment or consent in writing given by the author previously to that publication. The case of *Power v. Walker* is an authority to shew that a parol assignment is not sufficient to give to the assignee the privileges conferred by the Legislature upon the author. We are also of opinion that Kalkbrenner did not thereby acquire the exclusive privilege of printing, because it was not printed upon his account, nor was it done with a view of conferring any privilege upon himself. The next question is, whether the publication by the defendant, in 1818, was a wrongful publication, so that the author, or any person claiming under him, might put a stop to it? And that question depends upon two points; first, whether the protection and exclusive privilege given by the statute of Anne, and subsequent statutes, extends to cases where the author prints and publishes abroad only, without ever publishing in this country; and, secondly, whether it extends to cases where he is the first who publishes abroad, and afterwards is publisher here, but not until after a reasonable time for his publishing here has elapsed, and after some other person, without any fraud, and in the regular and fair course of trade, has published the work in this country. The different statutes which give protection to authors, do not give it as to all books, but as to printed books only. The 8 Ann. c. 19, begins by reciting, that printers had of

[ 866 ]

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[ \*867 ]

late frequently printed books and other writings, without consent of the authors, to their detriment, and too often to the ruin of \*them and their families, and to prevent such practices, and for the better encouragement of learned men to write useful books, it enacts, that the authors or purchasers of the copyright of books already printed shall have the sole right of printing such books for twenty-one years, and the authors of books not then published, or thereafter to be composed, should have the sole right of printing for fourteen years, and if any other person should print, reprint, or import, without consent from the proprietors, signed in the presence of two witnesses, or knowing of its having been so printed, should sell, without consent, he should pay a penalty. By section 2 no person shall be subject to these forfeitures for printing or reprinting unless the title of any book thereafter to be published shall, before such publication (i. e. before it is published by the author) be entered in the register book of the Company, at Stationers' Hall. By section 5 nine† copies of each book that shall be printed and published as aforesaid, shall be delivered to the warehouse-keeper of the Company at Stationers' Hall, before such publication made, for the use of the royal library, and the libraries of Oxford, Cambridge, the Scotch universities, Sion College, and the Advocates' Library, in Edinburgh, on pain of forfeiting 5*l.* for every copy, besides the value of the copy, and if the penalties are incurred in Scotland they shall be recovered in the Court of Session. By section 7 this shall not prohibit the importation, vending or selling of books in any foreign language, printed beyond seas. The statute of Anne, therefore, not only gives protection to authors as to books thereafter to be published, but to books previously printed, but the British Legislature must be supposed to have legislated with a view to British interests and \*the advancement of British learning. By confining the privilege to British printing, British capital, workmen, and materials would be employed, and the work would be within the reach of the British public. By extending the privilege to

[ \*868 ]

† Now five. The specified libraries are the British Museum, the Bodleian Library, Oxford, the Public Library, Cambridge, the

Advocates' Library, Edinburgh, and Trinity College, Dublin : 5 & 6 Vict. c. 45, ss. 6—9.—F. P.

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foreign printing, the employment of British capital, workmen, and materials might be suspended, and the work might never find its way to the British public. Without very clear words, therefore, to shew an intention to extend the privilege to foreign publications, I should think it must be confined to books printed in this kingdom, and instead of there being any such clear words to shew that intention, there are provisions which strongly imply the latter. The provisions directing that the authors of books generally shall have the sole right of printing and reprinting, and that before publication the title shall be entered, and copies delivered at Stationers' Hall, evidently contemplate a British, not a foreign publication. The 12 Geo. II. c. 36, which prohibits the importation of books reprinted abroad, and first composed and printed in Great Britain, evidently considers the statute of Anne as confined to books printed here. The 41 Geo. III. c. 107, contains provisions similar to those in the 8 Anne and 12 Geo. II., and extends those privileges to works published in Ireland and other places, so as to prevent the pirating of British works in any of the British dominions in Europe. But it has no provisions particularly bearing on the present question. By the 54 Geo. III. c. 156, the provision for delivering copies at Stationers' Hall, is repeated and it is provided, that on demand made in writing, at the place of abode of the publisher, within twelve months after the publication thereof, eleven copies shall be delivered at Stationers' Hall, under a \*penalty of 5*l.* for each copy not delivered, and the value, so that it clearly contemplates that the publisher must have a residence within this kingdom, and evidently looks not to a foreign but to a home publication. This last statute introduces, for the first time, after the word "composed," the additional words "printed and published," and therefore explains what might have been understood from the former provisions. Upon this view of the several statutes it appears to me that the Legislature contemplate publications here and here only, and that they contemplate such publications only when they are made by the author, or under such consent and authority from him as the statutes require, and that they contemplate such publications only when they are capable of advancing literature here, viz. before the work is published here, by a person who has obtained it fairly and *bonâ fide*, under a

[ \*869 ]



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previous publication, by the author in a foreign country. Now, here the work was composed before June, 1814. In that month the author sanctioned a publication of it in France, and five copies of it were deposited in a musical dépôt at Paris. In July, 1814, the author made a verbal arrangement with the plaintiff, and he published in the September following; but the publication was not a publication by the author, so as to entitle him to the statutory privilege, nor was it such a publication as would secure the right to the plaintiff, because it had not such authority or consent from the author as the statutes required. It was then an unprotected publication, and not a publication which would give an exclusive right, or preclude any other from publishing. Whilst things remained in this state the defendant published, viz. in 1818. The plaintiff had nothing to give him the semblance of a valid right \*till January, 1822, and the question is whether the subsequent assent of the author gave the plaintiff a right to put a stop to the circulation of that work. The point, whether an author publishing abroad is entitled to the privilege here, if he is the first person who publishes here, does not arise; because before there was any publication in this case which can stand in the place of an author's publication, there was an unauthorised publication by the plaintiff, and an unexceptionable publication by the defendant. The case, therefore, is reduced to this, whether an author who first publishes abroad, and instead of using due diligence to publish here, forbears to publish until some other person, fairly and without blame, publishes here, can insist upon his privilege, and, at a distance of time, stop a publication which, in the interim, has taken place here, and treat the continuance of that publication as a piracy, and we are of opinion that he cannot. Whether the act of printing and publishing abroad makes the work at once *publici juris* it is not necessary now to decide; but we have no doubt that it becomes *publici juris* if the author does not take prompt measures to publish here. To hold the contrary would discourage British enterprise, and stop the avenues to British knowledge. If the author does not promptly print and publish here, why are the public to be deprived of the benefits of British printing, and British publication? no good or plausible reason can be given for the deprivation. We are, therefore of opinion, that the publica-

[ \*870 ]

tion by the plaintiff, in 1814, was not such a publication as gave any privilege to him, or to Kalkbrenner, that the publication by the defendant, in 1818 was an unexceptionable publication, and that the assignment to the plaintiff, in January, 1822, did not \*give him any right to stop the sale of the defendant's publication, and consequently that this action cannot be maintained.

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[\*871]

*Judgment of nonsuit.*

THE KING v. THE INHABITANTS OF ST. NICHOLAS,  
IN THE BOROUGH OF LEICESTER.†

1824.

[ 889 ]

(2 Barn. & Cress. 889—891; S. C. 4 Dowl. & Ry. 462.)

An illegitimate child born in an extra-parochial place does not follow the settlement of its mother.

UPON appeal against an order of two justices, for the removal of Caroline Littlewood from the parish of All Saints, in Derby, to the parish of Saint Nicholas, in Leicester, the sessions confirmed the order, subject to the opinion of this Court, on the following case :

The pauper was the illegitimate child of Elizabeth Littlewood, deceased, and was born in the month of \*May, 1822, in an extra-parochial place, called the Black Friars, in Leicester, which is not a vill, and for which no overseers have ever been appointed. She was shortly afterwards taken by her mother to the parish of All Saints, Derby, where she remained until the death of her mother, and up to the time of making the order of removal in question, Elizabeth Littlewood, the mother, had, six years previously to the birth of the pauper, gained a settlement in the parish of Saint Nicholas, and was legally settled in that parish at the time of the birth of the child and of her own death.

[ \*890 ]

*Clarke*, in support of the order of Sessions :

This child having been born in an extra-parochial place, has not any settlement by birth, and, therefore, if it does not follow the settlement of the mother, it has not any settlement. In

† See judgment of BAYLEY, J., 10 Q. B. D. 172, 175; 52 L. J. M. C. cited by HAWKINS, J., in *Salford* 34.—R. C.  
*Union v. Manchester Overseers* (1882)

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*Sutley v. Whitbourn*<sup>†</sup> it was settled, that if a woman with child in the house of correction be there delivered of a bastard, the child shall be sent to the parish from which the mother was sent to the house of correction, to be there kept and provided for, this being the place where she was last settled; and that was before any statute was passed upon the subject. The 49 Geo. III. c. 68, s. 2,<sup>‡</sup> may be relied upon by the other side. That statute enacts, "that if any single woman shall declare herself with child, and that such child is likely to be born a bastard, and to be chargeable to any parish, township, or extra-parochial place, then the person charged by the woman with being the father of the child shall be compelled to give security to indemnify the parish or place," but the Act of Parliament alludes to an extra-parochial place maintaining its own poor.

[ 891 ]

*Nolan and Fynes Clinton, contra*, were stopped by the COURT.

BAYLEY, J. :

The argument in support of the order of Sessions is founded upon the assumption, that every person is by law entitled to a settlement in some place; but that is by no means the case, for foreigners have not any settlement in this country. A settlement attaches to those persons only, concerning whom those circumstances may be affirmed, which Acts of Parliament say shall give a settlement. Generally speaking, an illegitimate child is settled in the parish where it is born. There are some exceptions to this general rule, noticed in the treatises on the poor laws. In most of the excepted cases the mother, at the time of the birth, is in law supposed to be in the place of her settlement, where she ought to be: as where a woman with child is removed out of one parish into another, through the fraud or collusion of its officers, or where the child is born pending an order of removal. In one of these cases, the child, when born, is settled in the parish from which the mother has been fraudulently removed. In the other in the parish to which she is ordered to be removed. § In this case the child was born in an extra-parochial place. It therefore has not any settlement by birth, and being a bastard, it can

<sup>†</sup> 2 Bulstr. 358; 2 Bott. pl. 3.

§ See several cases in 2 Bott. c. 1, s. 1.

<sup>‡</sup> Repealed, S. L. R. A., 1872 (No. 2).

derive none from its parent. In such cases, however, it is entitled to remain with its mother as long as the purposes of nurture require it, and it will afterwards be entitled to relief as casual poor, although it has not any settlement. We are all of opinion that the order of Sessions must be quashed.

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v.  
THE INHABITANTS OF ST.  
NICHOLAS,  
LEICESTER.

*Order of Sessions quashed.*

WILLIAMS *v.* MORLAND.†

1824.

(2 Barn. & Cress. 910—917; S. C. 4 Dowl. & Ry. 583; 2 L. J. K. B. 191.)

[ 910 ]

Where, in an action on the case, a plaintiff alleged in his declaration that he was possessed of a messuage, &c., and by reason thereof entitled to the use of a stream of water running through the premises for supplying the same with water; and that defendant erected a certain dam higher up the stream, and thereby prevented the water from running in its usual course, in its usual calm and smooth manner, and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff; and on issue joined on a plea of not guilty, the jury found that the plaintiff's banks and premises were not injured by the dam erected by the defendant; but added, that defendant had no right to stop the water in the summer-time; the Judge ordered the verdict to be entered for the defendant: Held, that the verdict was right, for flowing water is *publici juris*, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose, and therefore, the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water.

DECLARATION stated, that the plaintiff, before the committing of the grievances thereafter mentioned, was lawfully possessed of a messuage or dwelling-house, lands, and premises, with the appurtenances, and by reason thereof of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a stream, called the Lee river, and which during all that time of right ought to have run and flowed, and until the committing of the grievances thereafter mentioned, of right had \*run and flowed, and still of right ought to run and flow, unto and past the lands and premises of the plaintiff, for supplying the same with water; yet the defendant,

[ \*911 ]

† Followed in *Kensit v. G. E. Ry. Co.* (1883-4) 23 Ch. D. 566; 27 Ch. Div. 122, 52 L. J. Ch. 608.

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well knowing the premises, but contriving, &c., heretofore, and whilst the plaintiff was possessed of the tenements, with the appurtenances, to wit, on, &c., at, &c., wrongfully and injuriously erected and made a certain pent-stock, dam, or floodgate, in and across the said stream, higher in the said stream than the tenements of the plaintiff, and wrongfully and injuriously widened and enlarged a certain other pent-stock, dam or floodgate, then being in and across the said stream, higher in the said stream than the lands and premises of the plaintiff, and kept and continued the said first-mentioned pent-stock, dam, or floodgate so erected and made, and the said other pent-stock, dam, or floodgate so widened, enlarged and altered respectively, in and across the said stream, for a long space of time, to wit, from thence hitherto and thereby unlawfully and wrongfully prevented the water of the stream from running and flowing along its usual and regular course, and in its usual calm, moderate, and smooth manner, unto and past the lands and premises of the plaintiff, as the same otherwise would have done, and thereby the water of the stream ran and flowed in a different direction or channel, and with much greater force and increased violence and impetuosity, unto and against the banks and premises of the plaintiff, and undermined, washed away, damaged, and destroyed the banks of the lands of the plaintiff, &c. The second count stated, that the defendant wrongfully and injuriously stopped, hindered, and prevented the water of the stream from running or flowing unto and past the tenements of the plaintiff, along its usual or regular

[ \*912 ] \*course, and in its usual calm and smooth manner, as the same otherwise would have done, and also wrongfully and injuriously caused the water of the stream to run and flow in another direction with much greater force, violence, and impetuosity, than it of right ought to have and would have done, in and against the lands and premises of the plaintiff, and thereby the banks and other parts of the lands and premises, &c. were damaged (as in the last count). Plea, not guilty. At the trial before Graham, B. at the last Summer Assizes for the county of Kent, the jury found that no damage had been done to the plaintiff's banks or lands either by the pent-stock set up, or that which was enlarged, but that their bad condition was owing to the plaintiff's neglect to

repair them; and they added, that they thought the defendant should not stop the water in the summer-time. It was then insisted, that the plaintiff was entitled, upon this finding, to a verdict, because the defendant had stopped the water from coming to the plaintiff's premises in the summer time. But the learned Judge was of opinion, that inasmuch as the plaintiff, in his declaration, did not complain that he was deprived of a supply of water, but that the natural course of the stream was altered, and that the water was caused to flow with greater impetuosity against his lands, whereby his banks were injured; and as the jury had found that the banks were not injured from such flowing of the water, the defendant was entitled to a verdict. Liberty, however, was reserved to the plaintiff to move to enter a verdict, with nominal damages. A rule *nisi* having been obtained for that purpose in last Michaelmas Term,

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*Marryat* and *Bolland* were to have shewn cause, but the Court called upon

[ 913 ]

*Chitty*, in support of the rule :

The jury have found, that the defendant ought not to stop the water from coming in summer to the plaintiff's premises. The stoppage of that water of itself is an injury, although no actual pecuniary damage ensue. In trespass to land it is not necessary to prove any actual damage; and if special damage be alleged, it need not be proved. Here the second count stated, as the ground of complaint, that the defendant wrongfully prevented the water from coming to the plaintiff's premises; that of itself constituted an injury, and then it was unnecessary to prove the special damage alleged; and therefore the plaintiff is entitled to the verdict.

BAYLEY, J. :

I think that this rule ought to be discharged. My judgment in this case is founded on the nature of flowing water, and the manner in which an exclusive right to it is obtained. Flowing water is originally *publici juris*. So soon as it is appropriated by

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an individual, his right is co-extensive with the beneficial use to which he appropriates it.† Subject to that right all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now if this be the true character of the right to water, a party complaining of the breach of such a right ought to shew that he is prevented from having water which he has acquired a right to use for some beneficial purpose. Here the declaration states a right to the use of this water at all times; but still, if \*the plaintiff had as much water as could be necessary for his purpose, the defendant would have been guilty of no wrong, by preventing additional water from coming to the plaintiff's premises. The gravamen of the plaintiff's complaint in his declaration is, not that the defendant prevented him from having the quantity which had formerly flowed to his premises, but that the defendant prevented the water of the stream from flowing along its usual course, in its usual, calm, moderate, and smooth manner unto the plaintiff's lands, and that his banks were injured by the impetuous manner in which it was caused to flow, by the act of the defendant. Now the jury have found, that the banks, &c. were not injured by the manner in which the water flowed; and that being so, it appears that the plaintiff has not sustained the injury complained of in the declaration, and therefore the verdict is properly entered for the defendant.

[ \*914 ]

HOLROYD, J. :

I think the verdict was properly entered for the defendant in this case. Running water is not in its nature private property. At least it is private property no longer than it remains on the soil of the person claiming it. Before it came there, it clearly was not his property. It may, perhaps, become, quasi, the property of another before it comes upon his premises, by reason of his having appropriated to himself the use of the water accustomed to flow through his lands before any other person had acquired a prior right to it. Thus in *Bealey v. Shaw*,‡ the

† This observation is criticised by *Richards* (1859) 7 H.L.C. 349.—R.C.  
 Lord WENSLEYDALE in *Chasemore v.* ‡ 8 R. R. 466 (6 East, 208).

defendants or those under whom they claimed had appropriated to themselves a quantity of the flowing water of the river Irwell, sufficient \*for the purposes of working their mill. The plaintiff afterwards erected premises lower down the stream, and appropriated to himself the surplus water for the use of his works. Four years after the plaintiff had erected his works, the defendants widened their sluice, so that nearly double the quantity of water was drawn from the stream, and the plaintiff's works were thereby materially impeded. It was held in that case, that although the defendants might originally have appropriated the whole water to themselves, yet they could not do so after the plaintiff had appropriated the residue of the unappropriated water to himself. If the plaintiff, therefore, in this case, had shewn in his declaration a right to the unappropriated water of the stream, and had alleged as the ground of his complaint that he had been deprived of the use of that surplus water, he might then have been entitled to a verdict. But the present declaration is framed to meet a different case from that now relied upon. The gravamen of the complaint is not that the water was prevented by the act of the defendant from coming down to the plaintiff's premises, and that he was injured by the want of water, but that it, in fact, flowed in a more impetuous manner, and thereby damaged the plaintiff's banks; but the jury have found that no damage has been done to the plaintiff's bank, by the manner in which the water was caused to flow by the act of the defendant. The jury have, therefore, found against the plaintiff in respect of the right of action which he claims. The mere obstruction of the water which had been used to flow through his lands does not of itself give any right of action. In order to entitle himself to recover, he should show the loss of \*some benefit, or the deterioration of the value of the premises.

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[ \*915 ]

[ \*916 ]

LITTLEDALE, J. :

I think that the plaintiff is not entitled to have the verdict entered for him in this case. The first count does not allege that the plaintiff was deprived of any benefit to which he was entitled, but that his banks were injured by reason of the water having been caused to flow in an impetuous manner. The jury have



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found that his banks were not thereby injured, and therefore the proof has not supported that count. The second count does not allege that the plaintiff was deprived of the use of the water, but that the defendant wrongfully prevented the water from flowing past the lands of the plaintiff along its usual course, in its usual calm and smooth manner, as the same ought to have done, and that his lands were thereby injured. It is true, that in trespass for a wrongful entry into the land of another, a damage is presumed to have been sustained, though no pecuniary damage be actually proved. So in the case of an action for the obstruction of a right of common, or a right of way, any obstruction of that right, is a sufficient cause of action. The doing of any act calculated to injure that right is a sufficient ground of action, but, generally speaking, there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case.† Now, assuming that the stopping of the water was a wrongful act of the defendant, has the plaintiff thereby sustained any temporal loss or damage. He alleges that he has sustained a damage, by his bank having been injured in consequence of the water flowing in a more impetuous manner. He does not allege that he has sustained any damage by the \*actual loss of the water. The jury have found that he has not sustained the damage alleged; and, therefore, they have negatived the ground of action stated in his declaration. Water is of that peculiar nature, that it is not sufficient to allege in a declaration, that the defendant prevented the water from flowing to the plaintiff's premises. The plaintiff must state an actual damage accruing from the want of the water. The mere right to use the water does not give a party such a property in the new water constantly coming, as to make the diversion or obstruction of the water, per se, give him any right of action. All the King's subjects have a right to the use of flowing water, provided that, in using it, they do no injury to the rights already vested in another by the appropriation of the water.

[ \*917 ]

*Rule discharged.*

† Cited by BOWEN, L. J., in Q. B. Div. 141, 150; 53 L. J. Q. B. *Brunsdon v. Humphrey* (1884) 14 476, 480.—R. C.

## DOE d. HERBERT v. SELBY.†

1824.

(2 Barn. &amp; Cress. 926—933; S. C. 4 Dowl. &amp; Ry. 1.)

[ 926 ]

Devise “to testator’s son G. for life, and from and after his decease unto all and every the child and children of G. lawfully to be begotten, and their heirs for ever, to hold as tenants in common, and not as joint tenants; but if my son G. should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then I give and devise the same estates unto my son T., my daughter A. S., and my son-in-law W. D., and to their heirs for ever, as tenants in common, and not as joint tenants.” After testator’s death, G. suffered a recovery, and died unmarried and without issue: Held, that in that event the devise over must take effect as a contingent remainder, and was therefore defeated by the destruction of the particular estate by the recovery.

EJECTMENT, for messuages and premises in the parish of St. Leonard’s, Shoreditch, in the county of Middlesex. The declaration contained counts, first on \*a demise of the entirety by Thomas Herbert, James Southern, and Ann his wife (in right of the said Ann) and William Duke, the 1st of January, 1821; secondly, on the demise of an undivided third by Thomas Herbert, same day; thirdly, on the demise of an undivided third by James Southern and Ann his wife (in right of the said Ann) same day; fourthly, on the demise of an undivided third, by William Duke, same day. Plea, general issue. At the trial before Abbott, Ch. J., at the Middlesex sittings after last Easter Term, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

[ \*927 ]

Thomas Herbert being seised in fee of the premises in question, made his will, duly executed and attested, so as to pass real estates, containing as follows, inter alia. “I give and devise unto my said son, George Herbert, two freehold houses in Burdett’s Buildings, Hoxton, in the parish of St. Leonard’s, Shoreditch, aforesaid, in the occupation of William Ames and Tabitha Kenner, also, &c. (certain other premises particularly described in the will,) to hold to him, my said son George, for and during the term of his natural life; and from and after his decease, I give and devise the same estates

† Applied by PEARSON, J. in 436, 443; 54 L. J. Ch. 502, 505.—*Watson v. Young* (1885) 28 Ch. D. R. O.

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[ \*928 ]

unto all and every the child and children of my said son George, lawfully to be begotten, and their heirs for ever, to hold as tenants in common and not as joint tenants. But if my said son George should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue; then I give and devise the same estates unto my said son Thomas, my daughter Ann Southern, and my son-in-law, William Duke, and their heirs for ever, to hold as tenants in common, and not as joint tenants." After the \*death of the testator George Herbert suffered a recovery to the use of himself in fee, and afterwards by lease and release conveyed the premises to the defendant in fee. In January, 1818, the said George Herbert died unmarried without having had issue, leaving the said Thomas Herbert, Ann Southern, then and still the wife of the said James Southern, and William Duke, named in the said will, him surviving.

*Chitty* for the plaintiff:

It was manifestly the intention of the testator, that his son George should take an estate for life only; and that if he had not any children, or none that should arrive at an age when they would by law be capable of conveying away the estate, it should go to the lessors of the plaintiff. It will be contended on the other side, that the ultimate remainder was contingent, and therefore defeated by the destruction of the particular estate. But that is not so, for either the estate given to G.'s children was an estate tail, in which case the ultimate remainder would be vested, or it was a contingent fee determinable, and the limitation over must take effect as an executory devise, according to *Gulliver v. Wickett*,† which is confirmed by the observations in *Fearne on Executory Devises*.: In either case, the destruction of the life estate of George would not destroy the remainder, and the lessors of the plaintiff are entitled to the estate. Here, even if the first contingency happened, viz. that George died leaving a child, yet if that child died under twenty-one without issue, the devise to the

† 1 Wils. 105.

† 396, sixth edit.

lessors of the plaintiff would take effect ; it could not therefore be a contingent remainder, \*but must be an executory devise : *Pells v. Brown*,† *Doe v. Webber*.‡ But, secondly, it may be contended that the children of George would take an estate tail, for although the devise is to them and their heirs for ever, yet as the estate is afterwards devised over in the event of their dying without issue, that reduces their interest to an estate tail : *Doe v. Reason*.§ Besides, as the ultimate remainder is to persons who would be heirs general to the children, they would never die without heirs as long as those persons lived. This case is therefore different from *Loddington v. Kime*|| and *Goodright v. Dunham*.¶

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[ \*929 ]

(BAYLEY, J.: But here you must read the devise, “if the children should die before twenty-one, and without issue,” otherwise the remainder over will be too remote.)

*Campbell, contrà*, was stopped by the COURT.

BAYLEY, J. :

There are two modern cases which are quite decisive of the present question: *Doe v. Burnsall*†† and *Crump v. Norwood*.‡‡ The present question arises upon a will, whereby the property was given to the testator’s son, George Herbert, for life and from and after his decease, to all and every the child and children of George and their heirs for ever ; but if George should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then to the lessors of the plaintiff, two of \*whom were children of the testator. It is not contended that George took an estate tail ; and, indeed, *Goodright v. Dunham* clearly shews that he took for life only, and that his children would take as purchasers by way of remainder, and they would take in fee. It has been contended, that the ultimate devisees took either by way of executory devise

[ \*930 ]

† Cro. Jac. 590.

‡ 19 R. B. 438 (1 B. & Ald. 713).

§ Cited in *Doe v. Holmes*, 3 Wils. 244.

|| 3 Lev. 431.

¶ 1 Doug. 264.

†† 3 R. R. 113 (6 T. R. 30).

‡‡ 7 Taunt. 362.

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or vested remainder. But it is clear, that where a devise may operate as a contingent remainder, it cannot be considered as an executory devise. If a fee be given by way of vested limitation, but determinable, a remainder after that must be an executory devise; but if a fee is limited in contingency, and upon failure of that the estate is given over, that is a contingency with a double aspect; and if the estate vests in the one, it cannot in the other: *Loddington v. Kime*. But it may happen, that an estate may be devised over in either of two events; and that in one event the devise may operate as a contingent remainder, in the other as an executory devise. Thus if George had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise. But George having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder. *Gulliver v. Wickett* was clearly a case of executory devise. The estate was given to testator's wife for life, and after her death to such child as she was then supposed to be enseint with, and to the heirs of such child for ever; provided, that if such child shall die before twenty-one, leaving no issue of its body, then the reversion over. The description of the child there was a clear *designatio personæ*, and as a child in ventre sa mere is for many purposes considered as *in esse*, the first remainder, a fee \*determinable was vested in that child, and the remainder over could only operate by way of executory devise. The other cases which I have mentioned are not in substance distinguishable from this; *Doe v. Burnsall* was a devise to Mary Owstwhick, and the issue of her body as tenants in common; but in default of such issue, or being such, if they should all die under twenty-one, and without leaving any lawful issue of their bodies, then over. Mary Owstwhick suffered a recovery, and died without having had any issue, and it was held that all the limitations subsequent to that to her were contingent, and destroyed by the recovery. No question was raised as to ultimate remainder operating by way of executory devise, but that could not be raised, as Mary Owstwhick never had any issue in whom the first remainder might vest. But *Crump dem. Woolley v. Norwood* is on all fours

[ \*931 ]

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with the present case. There the devise was to the testator's wife for life, if she should so long remain unmarried, and immediately after her decease or marriage, to testator's three nephews, share and share alike, for life, as tenants in common, remainder to the heirs of their bodies respectively in fee; if more than one, then to all equally, as tenants in common; "and if any of his said nephews should die, leaving no such issue, or leaving any such they should all die without attaining the age of twenty-one years, then over;" and it was held, that the remainders, subsequent to the devise to the nephews, were contingent, and defeated by the destruction of the particular estate. And one of the nephews having died without having had issue, GIBBS, Ch. J. considered that in that event the question of executory devise did not arise; although if there had been issue, \*the ultimate devise over might have operated in that mode. These authorities satisfy me, that in the event which has happened, the devise to the lessors of the plaintiff in this case did not operate by way of executory devise. It has been argued, that it might operate as a vested remainder, for that the devise to George's children was only of an estate tail, because they could never die without heirs as long as the lessors of the plaintiff lived, and, therefore, "heirs" must mean "heirs of the body." But although it may be so where, after a devise to a man and his heirs the estate is devised over *simpliciter* to a collateral heir, yet it is not so where the limitation over depends upon the party dying within a limited time. Upon the whole, I am of opinion that George Herbert took an estate for life only, and that his children, if there had been any, would have taken a fee; but in the event of there not being any, which is the event that has happened, the remainder over was given by way of contingent remainder, and was defeated by the destruction of the particular estate. Our judgment must, therefore, be for the defendant.

[ \*932 ]

HOLROYD, J. :

Under the will in question George took an estate for life, and his children in fee. In the event of his having no children, the devise over would operate as a contingent remainder: but if he

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had children, then it could only take effect as an executory devise. That it was not an executory devise, in the event that has happened, is clearly proved by the cases which my brother BAYLEY has cited; and the language of GIBBS, Ch. J. in *Crump v. Norwood* is peculiarly applicable. Here the estate is given over on either of two contingencies, one of them George's dying without children; that has happened, \*and upon that the remainder over would, if at all, take effect as a contingent remainder. But the particular estate having been previously destroyed, the contingent remainder was thereby defeated.

LITLEDALE, J.:

The principles applicable to this case were fully considered in *Crump v. Norwood*, which cannot be distinguished from it. *Doe v. Burnsall* is also in point. It is true, that in that case the words were "if all such issue should die under twenty-one and without issue;" but here the word *or* must be read *and*; and although the point of the executory devise was not there agitated, yet GIBBS, Ch. J. thought it an express authority for his judgment in *Crump v. Norwood*, where it was raised. Upon these authorities it seems to me clear, that the lessors of the plaintiff cannot recover.

*Judgment for the defendant.*†

† See *Hasker v. Sutton* 25 B. R. 695 (1 Bing. 500).

It was afterwards discovered that Thomas Herbert was heir-at-law of

the testator, and a fresh ejectment was brought, the Court having refused to grant a new trial in this case.

HANNAM *v.* MOCKETT.†

(2 Barn. &amp; Cress. 934—944; S. C. 4 Dowl. &amp; Ry. 518; 2 L. J. K. B. 183.)

1824.

[ 934 ]

Declaration stated that plaintiff was possessed of a close of land with trees growing thereon, to which rooks had been used to resort and to settle, and build nests and rear their young in the trees, by reason whereof plaintiff had been used to kill and take the rooks and the young thereof, and great profit and advantages had accrued to him, yet that defendant wrongfully and maliciously intending to injure the plaintiff, and alarm and drive away the rooks, and to cause them to forsake the trees of the plaintiff, wrongfully and injuriously caused guns loaded with gunpowder to be discharged near the plaintiff's close, and thereby disturbed and drove away the rooks, whereby the plaintiff was prevented from killing the rooks, and taking the young thereof. Plea, not guilty: Held, on motion in arrest of judgment, that this action was not maintainable, inasmuch as rooks were a species of birds *feræ naturæ*, destructive in their habits, not known as an article of food or alleged so to be, and not protected by any Act of Parliament, and the plaintiff could not therefore have any property in them, or shew any right to have them resort to his trees.

DECLARATION stated, that the plaintiff, before and at the time of the committing of the several grievances by the defendant, thereafter mentioned, was, and still is, lawfully possessed of a certain close of land, with certain trees growing and being thereon, situate, &c., to which said close and trees, so growing and being thereon, divers great numbers of rooks had been and were used and accustomed to resort and come, and to settle, build nests, breed, and rear their young in and upon the said trees, by means whereof the plaintiff had been and was used and accustomed to kill and take divers great quantities of the said rooks, and the young thereof, and thereby divers great profits and advantages had accrued, and still ought to accrue, to him, to wit, at, &c. Yet that the defendant, well knowing, &c., but contriving, and wrongfully and maliciously intending, to injure the plaintiff, and to alarm, affright, and drive away the said rooks, and to cause them to forsake and abandon the said trees of the plaintiff, and their nests built therein; and to prevent other rooks from resorting thereto, and settling in and upon the

† In *Read v. Edwards* (1864) 17 C. B. (N. S.) 245, 258, 34 L. J. C. P. 31, WILLES, J., on the above case being cited in argument, observes: "Some of the reasoning of BAYLEY,

J., in that case is not very satisfactory." But *quære* whether this remark is sufficient to wash the rooks white without the aid of a Court of Appeal.—R. C.



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[ \*935 ]

said trees, and to deprive the plaintiff of the profits and advantages so arising from the said rooks, and the \*young thereof as aforesaid, did theretofore, to wit, on, &c. at, &c. and on divers other days and times, between, &c. wrongfully and unjustly cause divers guns, loaded with gunpowder, to be discharged near to the said close of the plaintiff, and with the noise of the discharges of the said guns, and the smell of the said gunpowder, did disturb, terrify, and drive away divers rooks, then being in or near the said close and trees of the plaintiff, insomuch that divers, to wit, 1,000 rooks, which before that time had been used and accustomed to resort and come to the said trees, and to settle, build nests, breed and rear young in and upon the said trees, flew away and abandoned the said close and trees, and the nests built therein, and wholly forsook the same: and divers, to wit, 1,000 other rooks which were then about to resort to, and settle in and upon, the said close and trees, were thereby prevented from so doing; whereby the plaintiff hath been from thence, hitherto, and still is prevented from killing and taking rooks, and the young thereof, in such plenty as he otherwise might and would have done, and thereby the plaintiff hath lost and been deprived of the profits and advantages which might, and otherwise would, have accrued to him therefrom, to wit, at, &c. Second count, that the plaintiff was possessed of a certain dwelling-house, and certain closes of land adjacent thereto, with a certain vivary, called a rookery, in and upon one of the said last mentioned closes, situate, &c. to which said rookery divers great numbers of other rooks had been, and were used and accustomed to resort and come, and to build nests, abide, breed, and rear their young in the said rookery, by means whereof the plaintiff was used and accustomed to derive great profit and advantage from killing and taking the \*said last mentioned rooks, and the young thereof; and the said rookery was ornamental and advantageous to the said dwelling-house and closes of the plaintiff, and afforded great satisfaction and delight to the plaintiff, to wit, at, &c.: yet the defendant, well knowing the premises, but contriving, and maliciously intending to injure and aggrieve the plaintiff, theretofore, to wit, on, &c. at, &c. and on divers other days, &c. to wit,

[ \*936 ]

in, &c. wrongfully and unjustly caused divers other guns, loaded with gunpowder, to be discharged near to the said rookery of the plaintiff, and with the noises of the discharges of the last mentioned guns and gunpowder, did disturb and terrify divers rooks, then being in or near the said rookery, insomuch, that divers, to wit, 1,000 of the last mentioned rooks which had before that time been used and accustomed to resort and come to the said rookery, and build nests, abide, breed, and rear their young in the said rookery, then and there flew away, and wholly forsook and abandoned the said rookery, and divers, to wit, 1,000 other rooks, which were then about to resort to, and settle in, the said rookery, were thereby prevented from so doing, to wit, at, &c., by means whereof the plaintiff was, and still is, deprived not only of the satisfaction and delight, but also of the profits and advantages which might, and otherwise would, have accrued to him therefrom, and the plaintiff had been otherwise greatly injured and damnified to wit, at, &c. To the plaintiff's damage of 200*l.* Plea, not guilty. A general verdict having been found for the plaintiff, with 10*l.* damages, a rule *nisi*, for arresting the judgment, was obtained in last Michaelmas Term. The case was argued by *Bolland*, in support of the rule, and *Adolphus contra*, partly at the \*sittings in bank after Hilary Term, and partly at these sittings. All the arguments and authorities cited are so fully considered and commented on in the judgment of the Court, that it is unnecessary to state them here.

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[ \*937 ]

*Cur. adv. vult.*

BAYLEY, J. now delivered the judgment of the Court, and after stating the pleadings proceeded as follows :

The judgment in this case must be arrested if either of the counts is bad, because the damages have been taken generally on the whole declaration ; but there does not appear to be any material difference between them. The plaintiff does not state any special right in him to have the rooks resort to his trees ; he relies upon that general right which all the King's subjects have, and he describes the profit to arise to him, not from the eggs, but from killing the birds and their young. To maintain an action, the plaintiff must have had a right, and the defendant must have

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[ \*938 ]

done a wrong. A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. The injury in this case does not affect any right of personal security or personal liberty, nor any property in possession or in action; and the question then is, whether there is any injury to any property the plaintiff had a special right to acquire. A man in trade has a right in his fair chances of profit, and he gives up time and capital to obtain it. It is for the good of the public that he should. But has it ever been held that a man has a right in the chance of obtaining animals *feræ naturæ*, where he is at no expense in enticing them to his premises, and where it may be at least questionable whether they will be of any \*service to him, and whether, indeed, they will not be a nuisance to the neighbourhood? This is not a claim *propter impotentiam* because they are young, *propter solum* because they are on the plaintiff's land, or *propter industriam* because the plaintiff has brought them to the place or reclaimed them, but *propter usum et consuetudinem* of the birds.† They, of their own choice, and without any expenditure or trouble on his part, have a predilection for his trees and are disposed to resort to them. But has he a legal right to insist that they shall be permitted to do so? Allow the right as to these birds, and how can it be denied as to all others? In considering a claim of this kind, the nature and properties of the birds are not immaterial. The law makes a distinction between animals fitted for food and those which are not; between those which are destructive to private property and those which are not; between those which have received protection by common law or by statute and those which have not. It is not alleged in this declaration that these rooks were fit for food; and we know in fact that they are not generally so used. So far from being protected by law, they have been looked upon by the Legislature as destructive in their nature, and as nuisances to the neighbourhood where they are. That being so, surely a party can have no right to have them resort to his lands, to the injury of his neighbours; and, consequently, no action can be

† See the case of the *Swans*, 7 Co. Rep. 86.

maintainable against a person who prevents their so doing. It has been said, that a man may acquire rights over other animals *similis nature* as affording him diversion, such as rabbits in a warren, or doves in a dove-cote. But first it is to be observed, that rabbits and pigeons are not only subjects \*of diversion, but constitute an article of food. In 2 Inst. 199, it is said that “the common law gave no way to matters of pleasure (wherein most men do exceed), for that they brought no profit to the commonwealth; and therefore it is not lawful for any man to erect a park, chace, or warren, without a licence under the great seal of the King, who is *pater patriæ* and the head of the commonwealth:” but in the same page it is said “that fish-ponds being a matter of profit and increase of victuals, any man may erect.” And even with respect to animals *feræ nature*, though they be fit for food, such as rabbits, a man has no right of property in them. In *Boulston’s* case,† it was adjudged that if a man makes coney burrows in his own land, which increase in so great number that they destroy his neighbour’s land, his neighbours cannot have an action on the case against him who made the said coney burrows; for so soon as the conies come on his neighbour’s land, he may kill them, for they are *feræ nature*, and he who makes the coney burrows has no property in them, and he shall not be punished for the damage which the conies do in which he has no property, and which the other may lawfully kill; and WALMSLEY, J. says, “that the property of the conies is not in any man, nor can any man so keep them but that they will break out of themselves, which is the reason that none can have them in his own land, unless by grant from the King or by prescription; if otherwise, he is punishable in a *quo warranto*, for the Queen had the royalty in such things, whereof none can have any property.” Manwood in his *Forest Law*, p. 148, ss. 43, 44, takes notice of this power. It is stated to \*have been further resolved in that case, “that none may erect a dove-cote but the lord of a manor, and if any do it, he may be punished in the leet, but no action on the case lies by any particular man against him who erects it.” This resolution, as to the dove-cote being a common nuisance, was held not law, in *Dewell v.*

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† 5 Co. Rep. 105; Cro. Eliz. 547.

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*Sanders* ;† there it was expressly decided, that the erecting of a dove-cote by the freeholder of a manor was not a common nuisance, nor inquirable at the leet; but if the pigeons fly abroad to the damage of the King's subjects, the judges of assize may take cognizance of it, because it could not be a nuisance, but to those only whose corn they eat, and not to all persons; for if it were a common nuisance, neither the lord of a manor nor the parson could erect a dove-house more than any other freeholder; for none can prescribe to make a common nuisance; for it cannot have a lawful beginning, by licence or otherwise, being an offence against the common law; and therefore they held the opinion in *Boulston's* case to be no law. And it was said that the law protected and favoured dove-cotes; and therefore the erecting of them could not be a nuisance; for a dove-cote was demandable in a præcipe, and an account lay for it; and Montague said, that the erecting of a dove-cote of itself was not a nuisance, but the storing of it with pigeons, and suffering them to fly abroad into the country, which is out of the leet." The Court there took the sound distinction, that the erecting of a dove-cote was not a common nuisance, but that an individual might sustain a private injury from the doves, and that was cognisable before the justices in eyre. It is observable also, that

[ \*941 ] dove-cotes are protected by several statutes, \*which are referred to in that case. In the course of the argument DODDRIDGE, J. says, "that if pigeons come upon my land I may kill them, and the owner has not any remedy, provided they be not taken by any means prohibited by the statute." And to this CROKE and HOUGHTON, JJ. agreed; but MONTAGUE, Ch. J. "held that the party had *jus proprietatis* in them, for they are as domestics, and have *animus revertendi*, and ought not to be killed, and for the killing of them an action lies;" but the reporter adds, the other opinion is the best. Trespass will lie for breaking a dove-cote; and in *Arnold v. Jefferson*‡ it is said, "that a lord of a manor may erect a dove-cote upon his land, parcel of his manor, and this he may do by virtue of his right as lord thereof; but that a tenant cannot without licence, for he can have no right to any privilege which may be prejudicial to others; but

† Cro. Jac. 490.

‡ 3 Salk. 248.

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this is not a common nuisance, nor punishable in the leet. But the nuisance being particular, the lord shall have an action on the case, or an assize of nuisance, as he may for building a house to the nuisance of his mill." These authorities shew, that with respect to rabbits and doves, which may be injurious to the lands of others, generally speaking, a party has not a right to keep them even in his own lands, except by the King's licence, or unless he can shew a title by prescription, which supposes a grant. The reason given for requiring the grant is, that such animals are *nullius in bonis*, and no man can appropriate them to himself,† and for the same reason, none can make a park, chase, or warren without the King's licence. That being the law with respect to birds and animals whose habits are less destructive than those of \*rooks, it may be fit now to consider in what light the law looks upon birds of this latter description, and it will appear that they are considered nuisances to the neighbourhood where they resort. The stat. 24 Hen. VIII. c. 10,‡ entitled "An Act to destroy choughs, crows, or rooks," recites that they destroy great quantities of corn, as well in the sowing as at the ripening and kerneling thereof, that they make a marvellous destruction of the covertures of thatched houses, barns, ricks, stocks, and other such like ; so that if they be suffered to breed as in certain years past, they will be the cause of great destruction of corn and grain, to the great prejudice of the tillers and sowers of the earth : and it enacts, that every person having any lands, &c. in his own occupation, shall do as much as in him lies to kill and utterly destroy all choughs, crows, and rooks, coming, abiding, breeding, or haunting on the said lands, on pain of a grievous amercement. By sect. 2, the inhabitants of every parish shall, for ten years, provide and set nets for choughs, crows, and rooks, on pain to forfeit 10s. every lawful day such nets shall be wanting. By sect. 3, the tenants are for ten years yearly to assemble and survey the houses, &c. and conclude by what means it shall be best possible to destroy all the young brood of the choughs, crows, and rooks for the year, on pain to forfeit 20s. every year they shall omit to assemble. By sect. 5,

[ \*942 ]

† See *Case of Monopolies*, 11 Co. Rep. 87.

‡ Repealed 19 & 20 Vict. c. 64.

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“any person minding to destroy the said choughs, crows, and rooks, may, after request to the owner or occupier where they haunt or breed, enter and carry away all such rooks, &c. as he shall take the same day without let by the owner or occupier.” The 25 Hen. VIII. c. 11,<sup>†</sup> is not very material, but it is still in force. In that the word “rooks” is omitted, whether intentionally or not it is immaterial to enquire. The 8 Eliz. c. 15,<sup>‡</sup> \*revives the provisions in the 24 Hen. VIII. c. 10, as to the keeping of nets for choughs, crows, or rooks, but repeals all the other branches of that statute. It also provided, that in every parish sums should be raised for the destruction of noyful fowl and vermin: and for the heads of three old crows, choughs, pies, or rooks, or of six young ones, or for six eggs, is to be given a penny, and different sums for other different things. This statute was temporary, and was suffered to expire, but it was not repealed. It is not to be concluded, therefore, that the Legislature altered their opinion as to the nature of these birds, and they may now be considered to be of the description the statutes 24 Hen. VIII. c. 10, and 8 Eliz. c. 15, give them, viz. birds of destruction, and noyful fowl. It is not alleged upon this declaration that rooks are an article of food. At all events they are not so much so as rabbits. They certainly answer the description of animals *feræ naturæ*. They are not protected by any statute, but on the contrary have been declared by the Legislature to be a nuisance to the neighbourhood where they are. That being so, it is quite clear no person can claim a right to have them resort to his lands, nor can any person become a wrong doer by preventing their so doing. *Keeble v. Hickeringill*§ bears a stronger resemblance to the present than any other case, but it is distinguishable. There it was decided, that an action on the case lies for discharging guns near the decoy pond of another, with design to damnify the owner by frightening away the wild fowl resorting thereto, by which the wild fowl are frightened away and the owner damnified. But in the first place it is observable, that wild fowl are protected by the statute 25 Hen. VIII. c. 11; that they \*constitute a known article of food, and that a person keeping up a decoy

[\*944]

† Repealed 1 & 2 W. 4, c. 32.

§ 11 R. R. 273, n. (11 East, 574, n.).

‡ Repealed S. L. R. Act, 1863.

expends money and employs skill in taking that which is of use to the public. It is a profitable mode of employing his land, and was considered by Lord Holt as a description of trade. That case, therefore, stands on a different foundation from this. All the other instances which were referred to in the argument on the part of the plaintiff, are cases of animals specially protected by Acts of Parliament, or which are clearly the subject of property. Thus hawks, falcons, swans, partridges, pheasants, pigeons, wild ducks, mallards, teals, widgeons, wild geese, black game, red game, bustards, and herons, are all recognised by different statutes as entitled to protection, and, consequently, in the eye of the law, are fit to be preserved. Bees are property, and are the subject of larceny. Fisheries are totally different. The fish can do no harm to any one, and constitute a well-known article of food. Upon the ground, therefore, that the plaintiff had no property in these rooks, that they are birds *feræ naturæ* destructive in their habits, and not protected either by common law or statute, and that the plaintiff is at no expense with regard to them, we are of opinion that the plaintiff had no right to insist upon having them in his neighbourhood, and that he cannot maintain this action. The rule for arresting the judgment must therefore be made absolute.

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*Rule absolute.*



1824.

KENWORTHY *v.* SCHOFIELD.†

[ 945 ]

(2 Barn. &amp; Cress. 945—948; S. C. 4 Dowl. &amp; Ry. 556; 2 L. J. K. B. 175.)

At a sale of goods by auction, certain conditions of sale were read before the biddings commenced, but were not attached to the catalogue. An agent for the defendant was the highest bidder for a lot, and the auctioneer put down the price 105*l.*, and the agent's name opposite that lot, in his catalogue: Held, that sales of goods by auction are within the 17th section of the Statute of Frauds, and that no sufficient memorandum of the bargain was signed to satisfy that section, the conditions of sale not being annexed to the catalogue. Had they been annexed, it would have sufficed to put down the agent's name, that of his principal not being necessary.

SPECIAL assumpsit against the defendant, for not taking away a carding engine, purchased by him at an auction, agreeable to the conditions of sale, (which were set out), in consequence whereof it was resold at a loss. Plea, non assumpsit. At the trial before Holroyd, J., at the Lancaster Summer Assizes, 1823, it appeared that the engine in question was put up to sale by auction, among a variety of other things; the sale was subject to certain conditions, which were read by the auctioneer before the biddings commenced, but they were not attached to the catalogue or referred to by it. One Luke Winterbottom, as agent for the defendant, was the highest bidder for the engine, and it was knocked down to him, and the auctioneer wrote his name and the price, 105*l.*, against that article in the catalogue. For the defendant it was objected, first, that the Statute of Frauds was not satisfied by writing down the name of the agent of the purchaser: secondly, that the conditions of sale were part of the bargain, and not being annexed to the catalogue the signature to the latter did not amount to a signature of a note or memorandum of the bargain, within the meaning of the 17th section of 29 Car. II. c. 3. The learned Judge overruled the first objection, but reserved the second point, and the plaintiff having obtained a verdict, *Cross*, Serjt., in Michaelmas Term, obtained a rule *nisi* for a nonsuit or a new trial; against which

† Cited in judgment of HALL, V.-C., in *Rishton v. Whatmore* (1878) 8 Ch. D. 467, 468; 47 L. J. Ch. 629, 630; and referred to by Lord BLACKBURN in *Maddison v. Alderson* (1883) 8 App.

Cas. 467, 488; 52 L. J. Q. B. 737, 749, as the case which finally settled the point that sales by auction were within the Statute of Frauds.—R. C.

*J. Williams* now shewed cause :

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The second question now before the Court is certainly very important, as it respects the validity of all sales by auction. The first objection was overruled at the trial, and it appears by *\*Phillimore v. Barry*† that where an authorised agent bids at a sale, it is sufficient to put down his name; it is not necessary that the name of the principal should be then declared. The second question depends upon Lord ELLENBOROUGH's dictum in *Hinde v. Whitehouse*.‡ But that case was not decided on the ground that the memorandum was insufficient; the Court considered that there had been a delivery and acceptance of part of the goods, in the name of the whole, the other question therefore became unimportant. Suppose conditions of sale to be attached to a catalogue at first, but to be separated during the progress of the sale, will the sale of the lots previously knocked down be good, and of the rest bad? Surely, the reading of the conditions before the sale was sufficient to connect them with the biddings that afterwards took place. Perhaps it is too late to contend, that auctions of goods are not within the 29 Car. II. c. 3, although it appears by what fell from three of the learned Judges in *Hinde v. Whitehouse*, they did not concur in shaking the authority of *Simon v. Motivos*,§ where it was doubted whether such sales fell within the operation of the statute.

[ \*946 ]

*Cross*, Serjt. (with whom was *Starkie*) *contra* :

There was not any evidence to show that the defendant or his agent heard the conditions read; no proof was given of his being in any way conusant of them. They were not referred to by the catalogue. The mere signature of that was not then the signature of a note or memorandum of the bargain, within the meaning of the 29 Car. II. c. 3, s. 17. In *Hinde v. Whitehouse* the point was expressly brought under consideration.

He was then stopped by the COURT.

† 10 R. R. 742 (1 Camp. 513). Smith, 528).

‡ 8 R. R. 676 (7 East, 558; 3 § 3 Burr. 1921.

## K. B. TRINITY TERM.

1823.

[ 35 ]

THE KING *v.* THE JUSTICES OF THE HUNDRED OF CASHIOBURY.

(3 Dowl. &amp; Ry. 35.)

A *certiorari* always lies to remove proceedings under penal statutes, unless it is expressly taken away, and an appeal never lies unless it is expressly given by the statute.

This Court will not take notice of any formal defect in the proceedings under a penal statute, unless it appears on the face of the conviction itself.

*BROUGHAM* moved for a *certiorari* to remove a conviction under the stat. of 5 Anne for killing game, for the purpose of having it quashed for insufficiency, there being no appeal given by the statute to the Sessions. He admitted that the objection was not apparent upon the face of the conviction, but arose upon the form of the information. Upon which

The Court said, on the authority of *Rex v. Liston*,† that unless the objection appeared on the face of the conviction itself, no notice could be taken of it. And referring generally to penal statutes, they observed that this was the governing principle with respect to the writ of *certiorari*, and the right of appealing to the Sessions, namely, that the *certiorari* always lies, unless it is expressly taken away, and an appeal never lies, unless it is expressly given by the statute; and inasmuch as the statute 5 Anne, c. 14.‡ does not give an appeal in terms, there is no mode of re-considering the adjudication of the Justices, but by removing the proceedings by *certiorari*, but with this restriction, that no objection can be taken unless it appears upon the face of the conviction itself, and not upon any collateral proceeding. The Court added, that if there was any substantial ground for complaint, it was still open to the party to seek redress by a motion for a criminal information.

*Rule discharged.*

† 5 T. R. 338.

‡ Repealed 1 & 2 W. IV. c. 32.

## PASHLEY v. POOLE AND ANOTHER.

(3 Dowl. &amp; Ry. 53—54.)

1823.

[ 53 ]

There is no general rule by which a plaintiff is compelled to pay the costs of a former action before he is allowed to proceed with a second.†

A plaintiff declared in assumpsit against trustees of a turnpike road generally, went to trial, withdrew his record, and after suffering himself to be non prossed, sued the same trustees a second time by name, for the same cause of action, and the Court refused to stay the proceedings in the second, until the costs of the first action were paid.

THIS was a rule calling on the plaintiff to shew cause why the proceedings should not be stayed until the costs of a former action were paid. It appeared from the affidavits that the plaintiff had declared and proceeded to trial in an action for work and labour against the trustees of the Kilburne turnpike road, without naming any individual defendant or defendants. At the trial the record was withdrawn, and judgment of *non pros* was afterwards signed with the plaintiff's consent and the costs were taxed at 54*l.* 10*s.* Before the costs were paid, the plaintiff commenced another action against the present defendants, who are two of the trustees of the same road, for the same cause of action, and the question was, whether he could proceed until the costs of the former were paid.

*Reader*, on shewing cause, was stopped by the Court, and

*E. Lawes*, *contrà*, contended, that under the circumstances of the case, the plaintiff ought not to be permitted to proceed until the costs of the former action were paid. He insisted that this second action was vexatious, and brought for the purpose of putting a public body to unnecessary expense. In ejectionment causes, it was a matter of course to compel a plaintiff to pay the costs of a first action before he was permitted to proceed to a trial of a second, upon the same title; and latterly the Court had been disposed \*to extend the same equitable principle to other cases. Here the second action was for the same cause. The plaintiff had failed in the first in consequence of his own blunder, and it was but reasonable that he should be called upon to pay the costs of that action before he was allowed to go on with the second.

[ \*54 ]

† By R. S. C. Ord. 26, R. 4 "the Court or a judge may, if they or he think fit, order a stay" &c.—R. C.

PASHLEY     ABBOTT, Ch. J. :

<sup>r.</sup>  
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The present is an action brought for the recovery of a debt. It is not an action complaining of a malicious arrest, prosecution, or trespass in which cases the Court might be disposed to compel a plaintiff to pay the costs of a first action, before he was allowed to proceed in the second. This is an action for a pecuniary demand, alleged to be due from the defendants to the plaintiff, and we should be very careful before we deprived a party who has a debt owing to him, of the right of proceeding in his second action. If we saw clearly that he was proceeding in the second vexatiously, we should prevent him from so doing until he paid the costs. But here it appears that the first action was non-prossed in consequence of the plaintiff's declaring against the defendants generally as trustees, instead of by name. He discovers the names of the trustees, and sees that there is no use in going on to trial, because, if a verdict was recovered, the judgment might be arrested. I see no reason therefore, and I know of no authority for saying, that in a case like this, we ought to compel the plaintiff to pay the costs of the first action before he is allowed to go on with the second.

BAYLEY, J. :

There is no general rule by which a plaintiff is compelled to pay the costs of a first action, before he is suffered to proceed with the second. If that were a general rule, it might in many instances work injustice, for the defendant might not be able to pay the costs, and the only means of paying them might be by recovering his debt.

HOLROYD, J., concurred.

*Rule discharged, without costs.*

BRISTOW AND OTHERS *v.* BINNS.

(3 Dowl. &amp; Ry. 184.)

1823.  
June 2.  
[ 184 ]

An award against trustees and guardians of an infant, tenant for life of the realty, who died before the award was made, is not binding.

ON shewing cause against a rule for setting aside an award made concerning the repair of a weir upon a mill stream, it appeared that two of the plaintiffs were trustees and guardians under a will, for an infant, who was tenant for life of the property on which the weir was erected. Before the award was made, the infant died, and the award being made against two of the plaintiffs in their character of trustees, the question was, whether as to them, it was binding.

The COURT held that it was not, and ordered it to be set aside, as far as related to the trustees.

*Rule absolute.*

*F. Pollock* for the plaintiffs, and *Littledale* for the defendant.

CAYME *v.* WATTS.

(3 Dowl. &amp; Ry. 224—225.)

1823.  
June 5.  
[ 224 ]

An order of *Nisi Prius*, referring an action of debt on a money bond, (where the issue was payment by a co-obligor), and all matters in difference to arbitration, does not require the arbitrator to direct for what sum the verdict shall be entered; and the Court refused to set aside an award directing the verdict to be entered generally for the plaintiff, on a suggestion that the arbitrator ought to have directed for what sum judgment and execution should have been taken out, without proof that there were other matters in difference between the parties.

DEBT on a money bond. Plea, payment by another person, party to the bond, and issue thereon. By an order of *Nisi Prius*, at the last Assizes for Somersetshire, this cause and all matters in difference were referred to the arbitration of a gentleman at the Bar. The arbitrator, by his award, directed a verdict to be entered for the plaintiff generally. On a former day a rule *nisi* was obtained for setting aside the award, on the

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ground that it did not decide the question between the parties, inasmuch as the object of the reference was, that the arbitrator should specifically direct for what sum the verdict should be entered, and execution taken out, whereas by the award as it stood, it was competent to the plaintiff to take out execution for the whole penalty of the bond.

*Merewether* shewed cause, and contended, that as the order of *Nisi Prius* did not contain any specific direction to the arbitrator as to the manner in which he was to make his award, and as there was nothing before the Court to shew that there were any other matters in difference between the parties, but the issue on the record, his award was conformable to the order of *Nisi Prius*, and could not be disturbed.

[ \*225 ]

*Wilde, contra*, urged, that according to the spirit of the order of *Nisi Prius*, it might reasonably be understood by the arbitrator, that his attention was not to be confined \*to the mere issue on the record, but was to decide for what sum the defendant was actually liable, for otherwise the latter might be liable to execution for the whole penalty of the bond, although the greater portion of the debt might have been paid. The award, therefore, did not settle all matters in difference between the parties.

ABBOTT, Ch. J. :

Looking to the order of *Nisi Prius*, and to the issue on the record, and having nothing else before us, I think the award is sufficient. This was an action of debt for the penalty of the bond, and if the plaintiff recovered a verdict, the judgment must have been for the whole penalty. The defendant pleaded payment by another person, who was party to the bond, and that was the only issue. The order of *Nisi Prius*, is for a reference of this cause, and all matters in difference, but it does not appear that there were any other matters in difference between the parties, or that there was any question as to how much remained due on the bond. The arbitrator has therefore done right in directing that the verdict should stand.

BAYLEY, J. :

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We cannot, without an affidavit, assume that there were any other matters in difference between the parties except what appeared on the face of the order of *Nisi Prius* itself. The order does not import that it was at all a question between these parties how much was due, or for how much the verdict was to be entered. The argument urged in support of this rule, is applicable wholly to actions of *assumpsit*, and not to actions of debt on bond.†

BEST, J., concurred.

*Rule discharged, without costs.*

## THE KING v. JOHN MAYALL AND OTHERS.

1823.

(3 Dowl. &amp; Ry. 383.)

[ 383 ]

A notice of appeal against the allowance of overseers' accounts, that the different items thereof (enumerating them), would be objected to without specifying the particular causes or grounds of appeal pursuant to 41 Geo. III. c. 23, s. 4, is insufficient.

THIS was an appeal against the allowance of overseers' accounts for the township of Quick, in the parish of Saddleworth, in the West Riding of Yorkshire. At the Sessions, it was objected for the respondents, that the notice of appeal was insufficient, because it did not state and specify the particular causes or grounds of appeal, pursuant to 41 Geo. III. c. 23, s. 4, but merely transcribed every payment in the overseers' accounts, without suggesting any matter or cause of objection thereto. The Sessions, however, over-ruled the objection, considering the mode in which the accounts had been kept, and after hearing the appeal, disallowed the overseers' accounts, but reserved a case for the opinion of this Court.

*E. Alderson*, now appearing to support the order of Sessions, was directed to confine himself to the preliminary objection as to the sufficiency of the notice of appeal, and he contended, that

† Holroyd, J., was absent.



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this, like all other notices, must be taken with reference to the subject-matter, and the objection here being, that there was no sufficient proof of the fact of payment of the items in the overseers' accounts, the notice in question was insufficient.

BAYLEY, J. :

The notice of appeal being merely general, that the different items, enumerating all of them, will be objected to, without stating for what reason any one of them will be objected to, is clearly insufficient, and therefore I think the order of Sessions must be quashed.

HOLROYD and BEST, JJ., concurred.

*Order of Sessions quashed.*

*Littledale* and *J. Williams* were to have argued for the defendants.

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## K. B. MICHAELMAS TERM.

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1823.  
*Nov.* 11.  
[ 497 ]

DOE, ON THE DEMISE OF WILMOT, Esq., v. PICKERING  
AND OTHERS.

(3 Dowl. & Ry. 497—500; S. C. 2 L. J. K. B. 9.)

The exemplification of a recovery, suffered in bar of an entail, cannot be impeached by the recovery deed itself, although it is suggested that there have been alterations and erasures made in the latter, not noticed in the former.

EJECTMENT for lands and premises, situate in the parishes of Spondon and Chaddesden, in the County of Derby. At the trial, before Garrow, B. at the last Derbyshire Assizes, the case was this:—By articles of agreement, dated 10th December, 1718, Edward Wilmot, the grandfather of the lessor of the plaintiff, covenanted, in consideration of his marriage with Catherine Coke, to settle the estate in question, “ to the use of himself for his natural life, remainder to the use of trustees, also for his life, to preserve contingent remainders; remainder to the use of his wife, for her life, for her jointure, and in bar of dower;

remainder to the use of their eldest son and his heirs male ; remainder to the use of all their other sons, and their heirs male, in succession, the elder to be always preferred ; remainder to the use of their daughters, as tenants in common, and their heirs ; remainder to the use of his heirs generally." Edward Wilmot died in 1748, seised of the estate in fee, but without having made the marriage settlement, and by his will, \*dated 16th April, 1734, gave all his real and personal estates to his wife, to Richard Ballidon Wilmot, (the father of the lessor of the defendant) to Susan Coke, and Richard Wilmot (the father of the lessor of the plaintiff) surviving. By indentures of lease and release, dated 29th and 30th November, 1750, made between Catherine Wilmot (the widow) of the one part, and F. Lowe, and S. Webster, of the other part ; after reciting the agreement, and that no settlement had been made pursuant to it, and reciting the will of Edward Wilmot, Catherine Wilmot (the widow) granted to the said F. L. and S. W. the estate in question, "To hold to them, their heirs and assigns, for ever, to the use of herself, for her life ; remainder to the use of her eldest son and his heirs male ; remainder to the use of her second son, and his heirs male ; remainder to the use of her four daughters, Cassandra Bayles, wife of Martin Bayles, of London, and Elizabeth Wilmot, Mary Catherine Isabella Wilmot, and Ann Wilmot, and their heirs, as tenants in common ; remainder to the use of her own right heirs for ever." Catherine Wilmot died in August, 1751, leaving the said Francis Ballidon Wilmot her surviving. By indentures of lease and release, dated 1st and 2nd October, 1751, the lease made between the said F. B. Wilmot, of the one part, and Henry Wilmot and Francis Newdigate, of the other part, and the release made between the said F. B. Wilmot, of the one part, the said H. Wilmot and F. Newdigate, of the second part, and John Bateman and Charles Kirkman, of the third part ; the said F. B. Wilmot granted the estate in question to the said H. Wilmot and F. Newdigate, their heirs and assigns, To hold to them and their heirs, to suffer a recovery, which said recovery it was thereby declared should enure "to the only proper use and behoof of the said F. B. Wilmot, and of his heirs and assigns for ever." F. B. Wilmot con-

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WILMOT  
F.  
PICKERING.

[ \*498 ]

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[ \*499 ]

tinued in possession of the estate till the year 1798, when he died intestate, and the estate descended to the Rev. Francis Wilmot, his only son, and heir at law, who continued in possession till April, 1818, when he died, a bachelor and \*intestate, and the estate descended to Susan, the wife of John Coke, his only sister, and heir at law, under whom the defendants are in possession as tenants for a term. Upon the production of the recovery deed, and the exemplification thereof, it appeared that they differed from each other, the former having several erasures and alterations in the dates, the attestations, and various words in the body of the deed, which were unnoticed in the latter. The lessor of the plaintiff claimed as tenant in tail under the settlement of 29th and 30th November, 1750, and the defendants, for their lessor John Coke, claimed under the recovery. It was contended, on the part of the lessor of the plaintiff, that the recovery deed bore upon the face of it evident marks of fraud, and was therefore no bar to the entail; and on the part of the defendant that the exemplification being free from that objection, and being in the nature of a record, was in itself sufficient evidence of a good recovery, and therefore operated as a bar to the entail, independently of the deed itself; and the learned judge, being of that opinion, directed the Jury that they were bound in point of law to find a verdict for the defendants, which they did accordingly.

*Vaughan*, Serjt., now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground of misdirection. The deed was clearly fraudulent upon the face of it; it was plain that it had been executed at one period, and for one purpose, and had been recently altered so as to bear a later date, and to answer a different purpose. At least, therefore, the validity of the deed was a question which ought to have been inquired into, and upon which the jury should have been left to decide. Without such inquiry the exemplification was not conclusive evidence of the recovery, and ought not to have been admitted for that purpose.

ABBOTT, Ch. J. :

I am of opinion that the direction of \*the learned Judge was correct in point of law, and that the verdict was right. The exemplification was conclusive evidence of the defendant's title, and the state of the deed after such a lapse of years, was perfectly immaterial. The reasoning of Lord HOLT, in the case of *Lacy v. Williams*,† is quite decisive of the present.

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v.  
PICKERING.  
[ \*500 ]

BAYLEY, J. :

The exemplification of the recovery is a record, and it is not competent for us to look out of the record into the deed, in order to impeach the one for a supposed defect in the other. If the deeds were executed during the life of the tenant for life, still, if the recovery was not suffered till after his death, it would then become valid.

HOLROYD, J. :

The appearance of the deed, however suspicious it may be, cannot now affect the recovery ; the recovery would be good even though the deed were no longer in existence. That principle has been repeatedly laid down ; in *Roe v. The Archbishop of York*,‡ where it was held, that the mere cancelling in fact of a lease, is not a surrender of the term thereby granted, within the Statute of Frauds ; and in *Lord Downe's* case,§ where it was held, that where the deed to make the tenant to the præcipe is lost, the recovery may be amended by the inrolment itself being brought into Court.

BEST, J. concurred.

*Rule refused.*

† 2 Salk. 568.

§ *Dawney*, demandant, 4 Taunt.

‡ 8 B. R. 413 (6 East 86, 2 Smith 798.  
166).

1823.

Nov. 12.

[ 501 ]

LISTER *v.* BROWN.

(3 Dowl. &amp; Ry. 501—503 ; S. C. at Nisi Prius, 1 Car. &amp; Payne, 121.)

In an action on the 11 Geo. II. c. 19, against a tenant for fraudulently removing his goods to avoid a distress for rent, it is not necessary to shew an actual participation in the act, if the removal takes place with his privity.

THIS was an action on the statute 11 Geo. II. c. 19, for fraudulently removing goods to avoid a distress for rent. At the trial before Park, J., at the last Shropshire Assizes, it appeared in evidence, that the defendant had been tenant to the plaintiff of a considerable farm, but becoming embarrassed in his affairs, determined to give up the farm to his son, with an assignment of his effects, in consideration of the son paying the arrears of rent, and discharging certain debts then owing in respect of the farm. It was determined that an application should be made to the plaintiff to take the son as tenant instead of the defendant, at a reduced rent. Application was accordingly made to the plaintiff, who agreed, that as soon as the rent in arrear was paid, the son should thereafter be considered as tenant, but nothing was done to ratify the agreement, and the defendant still continued liable for the rent. In the mean time possession was delivered to the son, who on the 26th March following, clandestinely removed the goods to avoid the landlord's distress for rent, and this action was brought against the defendant. The father knew nothing of the removal, except that it appeared in evidence that on the evening of the 25th March, the son called upon him and told him of his intention to remove the goods. Upon which the defendant said "what is to become of me? I shall be liable for all the arrears of rent." To this the son answered, "I will take care of you." The learned Judge left it to the jury, whether under these circumstances the defendant was aiding and assisting in the distress; for if he was, his Lordship was of opinion that the defendant would be liable under the statute. The jury found for the plaintiff.

[ \*502 ]

*Pearson* now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted. The \*question

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v.  
BROWN.

is, whether the defendant, who must certainly be considered as the tenant, and therefore liable for the rent, can be answerable, unless he does some act shewing that he is a party to the fraudulent removal. The circumstance of his being cognizant of what is about to be done, a few hours before the actual removal takes place, will not make him liable, unless he takes some part in the unlawful act. The proposal for removing the goods originated with the son, and not with the father, and therefore, though the son might be liable for aiding and assisting in the act, still the father is not answerable, unless he does something in furtherance of the illegal object. The statute makes the tenant who shall fraudulently remove, and those who aid and assist in the removal, liable to the penalty. Here the father is the tenant, and it is clear that he does nothing whatever as tenant to bring him within the Act; and if he is to be charged as aiding and assisting, he ought not to have been sued in the character of tenant. The question here is, whether the tenant removed. If he did not, then the plaintiff must fail in this action.

ABBOTT, Ch. J. :

If in such a case as this, the tenant himself is not answerable, the statute would be utterly defeated, because nobody would be answerable. All that a tenant would have to do, would be to leave his farm, go to a distance, and some of his family may in the mean time clandestinely carry off all the effects, leaving the landlord destitute, perhaps, of the means of proving in what manner the removal takes place. This statute, though it is penal, is also remedial, and must receive a liberal construction. It places those who shall do the illegal act, and those who shall aid and assist, on the same footing; they are all liable to the same consequences as principals. I think the case was properly left to the jury.

BAYLEY, J. :

The question is, whether the act of removal by the son was not, coupled with the other evidence, sufficient to shew that

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 C.  
 BROWN.  
 [ \*503 ]

it was the act of the father also. I am \*of opinion that it was,  
 and that the jury drew the right conclusion.

HOLROYD and BEST, JJ. concurred.

*Rule refused.*

1823.  
 Nov. 12.  
 [ 503 ]

## KENNEDY v. GOUVEIA.

(3 Dowl. & Ry. 503—507.)

The consignee and agent of a vessel chartered for a specific voyage, enters into an agreement with the captain, describing himself as "consignee and agent" of the above brig and cargo, on behalf of Mr. M. merchant, of L." the agreement stating, that "it is witnessed, that the said parties agree" that the vessel shall go to another port, there discharge the remainder of her cargo, and receive a full and complete homeward cargo at the same freight as she would have got had she proceeded on the voyage stipulated in the charter-party, and then signs the agreement in his own name, without describing himself as agent:—Held, that he made himself personally liable for the freight of the homeward voyage.

ASSUMPSIT on a charter-party of affreightment by plaintiff, the master, to one Meirelles, of the ship *Sir Alexander Mackenzie*, on a voyage from Liverpool to Ceara and Aracati and back, with cargoes. The declaration set out the charter-party, and then averred, that the ship arrived at Ceara, and unloaded part of her cargo there, but that before she had wholly unloaded, an agreement was entered into between plaintiff and defendant, which was also set out, and was as follows:—"CEARA, 30th Nov. 1822. It is mutually agreed between Captain Kennedy, master of the brig *Sir Alexander Mackenzie*, of the one part, and Mr. Gouveia, consignee and agent of the above brig and cargo, on the behalf of Mr. Meirelles, merchant, of Liverpool, of the other part, witnesseth, that the said parties agree to the following; that is to say, the said brig shall proceed direct to Maranhão, with part of her outward cargo, and there discharge the same, instead of delivering it here, being deemed unsafe to the interest of the concerned, to be disposed of in Ceara, on account of the disordered state of affairs in general; and on delivery of same said cargo at Maranhão, is there to receive on board a full and complete cargo of cotton, for Liverpool, at the same freight as the

vessel would have got had she proceeded on to Aracati, and there loaded a cargo as stipulated in the charter-party for Liverpool. Ere we proceed further, it is to be understood, \*that this agreement is not to be considered as a general deviation from the original charter-party, but rather a continuance of the same, made, as above stated, on account of political motives. Mr. Gouveia also agrees to furnish the said brig, if possible, with a pilot to Maranham, and likewise to pay two-thirds of the port-charges there, which is considered by both parties sufficient compensation to the ship for such change of voyage. The discharging and taking in the cargo, the payments, demurrage, &c. at Maranham, shall remain the same as if the vessel had remained here or proceeded to Aracati, as specified in the charter-party; both parties, therefore, clearly understanding the above agreement, sign their names," &c. It then averred, that in pursuance of this agreement, the ship went to Maranham, and there discharged the rest of her cargo, and received on board a full cargo of cotton for Liverpool, where she afterwards arrived and discharged the same, and that the freight amounted to 812*l.* 7*s.* 1*d.* Breach, that defendant, on request, would not pay that sum, or any part thereof. Plea, *non assumpsit*, and issue thereon. At the trial before Bayley, J. at the last Lancashire Assizes, the plaintiff's case rested upon the production and proof of the charter-party and agreement, proof of the averments respecting the change of voyage, and discharge of cargo, and the testimony of Mr. Meirelles, who stated, that he had never authorised the defendant to vary the charter-party, and had therefore thrown up the contract as void; that he chartered the vessel on his own account; and that the outward cargo was on account of the defendant, and the homeward cargo on account of himself. In answer to this case, it was contended, that the defendant having acted merely as the agent of Meirelles, the original charterer, was not personally liable upon the agreement, and therefore that the plaintiff must be nonsuited; but the learned Judge being of opinion, that as he had acted without any direct authority from his principal, he was, in point of law, liable upon his own undertaking, directed the Jury \*to find a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

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GOUVEIA.  
[ \*504 ]

[ \*505 ]



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r.  
 GOUVEIA.

*Littledale* now moved accordingly, and renewed the objection:

It is clear from the language of the agreement, that the defendant was acting as an agent, in the way which he thought most beneficial for his principal, under an emergency. It states, that the defendant acts "on behalf of Mr. Meirelles," and assigns as his motive, "it being deemed unsafe to the interest of the concerned," that the ship should remain at Ceara, which was a circumstance that would fairly give him a general and implied authority to act as he did.

(ABBOTT, Ch. J.: The agreement witnesses "that the said parties agree" without any reference there to any third person; the defendant is one of "the parties;" then are there not two modern cases, *Appleton v. Binks*,† and *Burrell v. Jones*,‡ decisive of this?)

Both those cases are distinguishable from this; in the one the agreement was under seal, and the defendants there covenanted in express terms; in the other there was a distinct personal undertaking. This is a mere memorandum of agreement; the defendant only agrees, and that expressly on behalf of another.

(ABBOTT, Ch. J.: So it was in *Appleton v. Binks*; the defendant there covenanted "for and on the part and behalf of" another person; and what distinction is there between the words "covenants" and "agrees"? If a man covenants in his own name on behalf of another, he is liable on his covenant; and if he promises in the same manner, he is liable upon his promise in *assumpsit*.)

In *Bowen v. Morris*,§ twice argued in the Exchequer Chamber, MANSFIELD, C. J. said, "this contract did not bind the defendant personally, because he did not contract on behalf of himself

† 7 R. R. 672 (5 East, 148, *Haldimand*, 1 R. R. 177, 1 T. B. 172, and *Iveson v. Conington*, 25 R. R. 344 1 Smith 369).

‡ 22 R. R. 296 (3 B. & Ald. 47). (1 B. & C. 160, 2 Dowl. & Ry. 307,

§ 2 Taunt. 374. See *Macbeath v.* 1 L. J. K. B. 71).

personally ; he acted merely as an agent.” That applies precisely to the present case.

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(ABBOTT, Ch. J. : There \*the defendant was the public officer of a corporation, and acted wholly as their servant.) [ \*506 ]

Besides there is no mutuality in this contract ; the plaintiff had no authority to agree to the substitution of another voyage ; he was exceeding his power, as master, in so doing : *Burton v. Sharpe* ;† and therefore the contract cannot bind the defendant. If the plaintiff had sued on the original charter-party, it would have been no defence to that action, that a subsequent agreement not under seal had been made between the parties.

(BAYLEY, J. : I am not quite certain of that ; at all events it would have gone in mitigation of damages.)

The original charter-party was abandoned on account of a supposed deviation in the voyage, but the agreement expressly states that the ship's going to Maranhão “is not to be considered as a general deviation from the original charter-party, but rather a continuance of the same.” In fact it was a continuance of it ; it was entered into by the defendant as the agent of Meirelles, and for his benefit, and therefore the plaintiff's remedy is against him, and he ought not to be allowed to throw off his responsibility, and cast it upon the defendant.

ABBOTT, Ch. J. :

The language of the agreement, the conduct of the defendant, and the cases to which I originally alluded, all combine to shew that the defendant is liable in this action. He signs the agreement in his own name, and does not say that he signs for another. The language of the instrument is, “It is agreed between the parties.” Who are the parties ? The defendant and the plaintiff ; therefore he has made himself personally liable, for the default of his principal on the one hand, and on his own personal undertaking on the other. I think the case was properly ruled at *Nisi Prius*.

† 11 R. R. 788 (2 Camp. 529).

KENNEDY BAYLEY, J. :

r.  
GOUVEIA.

[ \*507 ]

The arrangement expressed in the agreement was a bargain between the plaintiff and the defendant, \*and whether made with, or without the authority of Meirelles, is quite indifferent now; the defendant is equally liable upon the agreement as it is worded. The evidence clearly proved that the defendant gave instructions to the plaintiff all the way through, and conducted himself as a principal from first to last.

HOLROYD and BEST, JJ. concurred.

*Rule refused.*

1823.  
Nov. 26.

[ 603 ]

## MORRIS v. JONES.

(3 Dowl. &amp; Ry. 603—606.)

If the parties to a warrant of attorney agree that execution shall issue upon the judgment after a year and a day without reviving the judgment by *sci. fa.* there is nothing illegal in such a bargain, and execution may be taken out notwithstanding the stat. Westm. 2.

Copyhold lands cannot be extended under an elegit,† but, if the inquisition comprehends both freehold and copyhold, it may be good as to the former, and bad as to the latter.

Where, under one elegit, a moiety† of defendant's lands were taken to satisfy a judgment; and under a second elegit, the whole of the remainder of his lands were taken instead of a moiety of the moiety:—Held, that the second elegit was a mere nullity, and there was no occasion to apply to the Court to set it aside.

J. EVANS, on a former day, moved for a rule to shew cause why the two writs of elegit, and the inquisitions taken thereon, which had been sued out upon a judgment entered up on a warrant of attorney, given to secure an annuity granted by the defendant to the plaintiff, should not be set aside for irregularity. He submitted four grounds of objection, first, that the judgment was more than a year and \*a day old, and no *scire facias* had been sued out to revive it. It was true that the warrant of attorney contained an agreement to waive this irregularity; but he submitted that as the plaintiff was by common law left to his action on the judgment, he could only

[ \*604 ]

† The scope of the writ of elegit is enlarged by 1 & 2 Vict. c. 110, s. 11; but the case may still be an authority as to the effect of erroneous execution.—R. C.

have execution upon it by complying with the requisites of the stat. Westm. 2,<sup>†</sup> and the defendant's consent could not dispense with compliance with those requisites. This principle had been laid down respecting warrants of attorney granted by prisoners, *Hutson v. Hutson*,<sup>‡</sup> and applied by analogy to the present case. Second, the extent made upon the defendant's lands was excessive, being more than double in value the amount of the debt owing; and as the lands could not be extended at all, where there are goods to satisfy the debt,<sup>§</sup> by parity of reasoning it would appear that no more of the lands should be extended than was fairly requisite; besides which the warrant of attorney contained a stipulation that only so much land as was necessary should be taken.

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v.  
JONES.

(ABBOTT, Ch. J.: That objection, if tenable, would affect the inquisitions only, not the writs of elegit.)

Third, copyhold lands have been extended, which is clearly illegal: *Gery v. Smart*; <sup>||</sup> 7 Rep. 49, and Plowd. 224; and that will render the extent void *in toto*: *Berry v. Wheeler*,<sup>¶</sup> *Earl Stamford v. Hobart*,<sup>††</sup> Com. dig. Execution, C. 14, and *Putten v. Purbeck*.<sup>‡‡</sup>

(BAYLEY, J.: That may be fatal to the extent in part, but will it render it void *in toto*?)

It must have an effect co-extensive with the execution; the execution is entire, and therefore the extent is bad for the whole.<sup>§§</sup>

(BAYLEY, J.: That might be so if more than a moiety of the lands had been taken; but that is not alleged here. Suppose some freehold, and some copyhold lands taken, and the sheriff extends a moiety of each; the extent would be bad as respects the copyhold, but it would remain good as \*against the freehold.) Upon the authorities already referred to, it would appear that

[ \*605 ]

<sup>†</sup> 13 E. 1. st. 1. c. 45.

<sup>‡</sup> 4 R. R. 367 (7 T. R. 7).

<sup>§</sup> 2 Inst. 395. Com. Dig. Execution, C. 14.

<sup>||</sup> Dyer, 205, b.

<sup>¶</sup> 1 Sid. 91.

<sup>††</sup> Id. 239.

<sup>‡‡</sup> 2 Salk. 563.

<sup>§§</sup> Co. Lit. 189 b.

MORRIS  
v.  
JONES.

the extent in such a case would not be severed, and that being bad for a part, it would be bad for the whole. Fourth, under the second elegit, the whole of the defendant's lands left after the first elegit, were extended, which cannot be done; for upon a second writ only a moiety of that moiety which was not extended by the first can be taken : *Huyt v. Cogan*.†

ABBOTT, Ch. J. :

We think there is nothing in the first two objections. If the defendant thought proper to enter into a bargain that execution should issue upon the judgment, without a *scire facias* to revive it, he cannot afterwards be permitted to avoid the consequences, by setting up the illegality of the proceeding. A warrant of attorney, given by a prisoner, presents a very different consideration, because there the party may be supposed to act under duress. Second, as it does not appear that more than a moiety of the lands was taken under the first inquisition, that cannot be called excessive; a moiety is the proportion which the law directs to be taken, and if that eventually proves more than sufficient to pay the debt, the surplus may be paid over to the defendant. As to the other objections, take a rule *nisi* for setting aside the first inquisition with respect to the copyhold lands, and the second altogether.

*Tindal* now shewed cause :

In answer to the first objection, which applies to the first inquisition, it is distinctly sworn, on the part of the defendant, that no copyhold lands have been taken, and the Court will not interfere in such a case to try a doubtful question of fact upon contradictory affidavits. With respect to the second inquisition, it must be admitted that the sheriff has acted erroneously in seizing the whole residue of the lands; but that forms no ground for the present application, because the return to the second elegit is altogether void, and may be treated as such by the \*defendant, without the interference of the Court: *Fenny v. Durrant*.‡ Upon both points therefore the rule must be discharged.

[ \*606 ]

† Cro. Eliz. 482.

‡ 1 B. & Ald. 40.

*Brougham and J. Evans*, in support of the rule.

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r.  
JONES.

Upon the latter point, at least, the Court will think this a proper case for their interference, in the summary way suggested by this motion. The defendant has been injured by the operation of the second inquisition, although it may now be abandoned; because in the mean time the tenants have received notice to pay their rents to the plaintiff, and the defendant can have no mode of recovering the payments so made, except by an action. The inquisition therefore being clearly bad, and its operation being to prejudice the defendant, the Court will protect his interests by setting it aside.

ABBOTT, Ch. J.:

We are of opinion that this rule must be discharged. The first part of it relates to copyhold property, and the ground upon which we granted the rule as to that was, a distinct allegation of fact, that the inquisition included copyhold land. It is now, however, suggested on affidavit, that no copyhold has been extended. That is a question which we cannot try upon affidavit. Indeed it is unnecessary we should do so, for if copyhold has been taken under the first inquisition, that inquisition, as far as it relates to that part of the property, must be abandoned as invalid. Then, as to the second objection, the case cited shews that this application was perfectly unnecessary, inasmuch as the objection is fatal in point of law to the second inquisition. On the face of it, it is void in itself, and does not require the aid of this Court to set it aside. There is no occasion to apply to us to set aside a nullity. Let the rule, however, be discharged without costs, the plaintiff undertaking to pay over to the defendant the sum extended under the second elegit.

*Rule discharged, without costs.*

1823.  
Nov. 25.

## THE KING v. WILLIAMS AND ROMNEY.

(2 L. J. K. B. 30—31.)

[ 30 ]

It is a misdemeanour to prejudge a criminal case by representing, in a theatrical exhibition, a man in the act of committing the offence.

John Thurtell was committed to prison to take his trial for the murder of Mr. Weare. The proprietor of a theatre represented the supposed facts of the case in such a manner, that, when a murderer was seized, the audience expressed themselves as understanding that he represented John Thurtell, and the Court granted a criminal information against the proprietor.

A man's name appearing at the bottom of the play-bill, is not, of itself, *prima facie* evidence that he printed it.

*DENMAN*, C. S. and *Barnewall* showed cause against a rule *nisi* for a criminal information against the defendants, for a misdemeanour by endeavouring to obstruct the course of public justice.

It appeared that John Thurtell and others had been committed to the gaol at Hertford to take their trials for the murder of Mr. Weare, a gambler, who had won money of John Thurtell. That a bill for a conspiracy to defraud the County Fire Office, by setting fire to a house in Watling-street, had been found against his brother Thomas Thurtell. That accounts had appeared in all the newspapers giving statements of the evidence before the magistrates and the coroner's jury; and almost all the circumstances attending the case, as that the murder was committed by John Thurtell on Mr. Weare in Gill's Hill Lane, by which place they had to pass in going to a cottage belonging to Mr. Probert, who was also committed to the same prison for the same offence.

It further appeared from the affidavit of the attorney of John Thurtell, that he, understanding that a piece called "The Gamblers" was to be performed at the Surrey Theatre, went there to give notice to the proprietor (Williams) that he should move for a criminal information against him, if the piece was not withdrawn; that he bought a play-bill at the door, at the foot of which were the words "J. Romney, Printer, Lambeth;" that he witnessed the representation; that incidents of the drama closely resembled those which had been published in the newspapers as to the offence with which John Thurtell was charged, with a few deviations; that one of the actors personated John

Thurtell; that the audience manifested considerable emotion when he was taken into custody; that the whole performance was such as greatly to prejudice the prisoner at the time of his trial; and that the scenery consisted of Probert's cottage, the ruins of the fire in Watling street, a gambling house, and Gill's Hill Lane, with the horse and gig.

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v.  
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They contended that the affidavit in support of the rule was insufficient, because it referred to publications in the newspapers, of which the Court could not take judicial notice, and therefore they only had the opinion of the attorney of John Thurtell as to the purport of the representation, and consequently, that they could not judge of the real effect produced.

*Gurney*, in support of the rule, contended, that sufficient had been shown to convince the Court that the piece was intended to be a representation of the committal of a crime, for which the perpetrator had not yet taken his trial.

#### BY THE COURT:

We think that the defendant Romney is not shown to be the printer of the play-bill, it is not sworn that there is any reason to believe that he printed it, there is not any authority for saying that the mere circumstance of a man's name being printed at the bottom of a hand-bill is even *prima facie* evidence that he printed it.

We are clearly of opinion that the rule \*must be made absolute against the proprietor Williams. We certainly cannot take notice of any facts which are not brought before us in affidavits; but we may throw out of the case the whole of the matter respecting the newspapers. It is sworn by a person who was present in the theatre at the time this most censurable piece was exhibited, that one John Thurtell has been committed for trial on a charge of murder, and that a performer appeared in the melo-drama as a murderer, who, he believes, represented John Thurtell, and that the audience, by the manner in which they expressed exultation, so understood the character.

[ \*31 ]

Any attempt whatever to prejudge a criminal case, whether by a detail of the evidence, or by a comment, or by a theatrical



THE KING <sup>v.</sup> WILLIAMS. exhibition, is an offence against public justice, and a serious misdemeanour. The law is too clear for any man to doubt about it, and the affidavit makes out the offence against the proprietor.

*Rule absolute.*

1824.  
Jan. 26.

THE KING *v.* SHERWOOD AND ANOTHER.

(2 L. J. K. B. 78—79.)

[ 78 ]

When a person has obtained a rule *nisi* for a criminal information, the Court of King's Bench will not compel him to make it absolute.

[ 79 ]

SCARLET showed cause against a rule for a criminal information against the defendants, for publishing an account of the murder of Mr. Weare, and a history of John Thurtell, before he had been tried ; which contained matter likely to prejudice him on his trial.

Chitty, who had obtained the rule *nisi*, as the defendants had stopped the circulation of the book the moment they were aware of its ill tendency, wished not to proceed if the Court would permit him to withdraw the rule.

By THE COURT :

We have not any power to compel a party to proceed in a criminal information.

*Rule discharged.*†

† It was understood that the defendants had consented to pay the costs of the motion to the prosecutor.

MANSFIELD AND BRIGGS *v.* CHESLYN, GENT. &C.

(2 L. J. K. B. 85—86.)

1824.  
Jan. 29.

[ 85 ]

A party agreed in writing to purchase the mail coach concern between Derby and Leicester, provided the postmaster consented. The party afterwards took possession of it with the risk of obtaining that consent. The Court held that the proviso had been waived.

DECLARATION, in assumpsit on an agreement. Plea,† the general issue.

It appeared at the trial before the Lord Chief Justice at the last sittings in London, that the defendant, having purchased of Mr. Mawe the profits of the mail coach from Derby to Leicester, and also twenty-one horses, with the harness, by an agreement dated the 5th May, 1823, agreed to sell, and the plaintiffs agreed to purchase, for 1,050*l.* all their right and interest in the mail coach business and concern from Derby to Leicester, and also the twenty-one horses, with the harness, and all the stable furniture, &c. ; in which agreement was the following proviso :

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“ Provided nevertheless, and it is hereby expressly agreed between the said parties hereto, that unless the Postmasters-general, or their secretary or agent, shall accept the said Edward Mansfield and James Briggs upon the contract of the said mail coach business between Derby and Leicester as aforesaid, this agreement, and every matter and thing herein contained, shall be void and of no effect.”

The agreement then stated that the plaintiffs were to be put into possession of the business on the seventeenth of May then inst. and then pay 550*l.* and give security for 500*l.*

It further appeared, that the parties met on the sixteenth of May, and the plaintiffs paid the 550*l.* and gave security for 500*l.* and took possession of the business ; that applications were made to the agent of the post-office, but he refused to accept the plaintiffs, with Mr. Stenson, as contractors ; that the defendant, when he was informed by the plaintiff Mansfield of it, observed,—“ You know Mr. Mansfield you took the risk on yourself, and wished the contract completed,” to which Mr. Mansfield made no reply.

† There was another plea not material to the report of the case.

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r.  
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The learned Judge left to the jury the question, whether the plaintiffs consented to waive that proviso in the agreement respecting the acceptance of them as contractors by the Postmaster, and the jury found a verdict for the defendant.

*Copley*, Serjt., A.-G. moved to set aside that verdict, and contended that there was not any evidence to warrant it, for that the waiver ought to be in writing.

By THE COURT :

We are of opinion that the question was properly left to the jury. An agreement is entered into by the defendant to sell a business to the plaintiffs that is to be of value only on a certain event, which is therein stated. The plaintiffs accept the horses and commence the business before the consent of the Postmaster is obtained, and when one of them is told by the defendant that he took the risk of having that consent upon himself, he makes no answer, so that the defendant is in fact prevented from exciting them to acquire that approbation. No doubt an agreement of this description may be altered by parol. Perhaps the defendant has been hindered from selling to some one else. We think that there was sufficient evidence that the plaintiffs took upon themselves to procure the consent of the Postmaster, and consequently that the proviso in the agreement was waived by them.

*Rule refused.*

1824.  
*Feb.* 10.

[ 93 ]

## ANONYMOUS.

(2 L. J. K. B. 93.)

The Court will, as a matter of course, grant a mandamus for the admission of a person to copyhold premises, that he may try his right to them.

*BROUGHAM* showed cause against a rule for a mandamus to admit a copyholder.

It appeared that the person who wished to be admitted, claimed under a deed of gift which had not been presented to the Court, although it was more than three months old ; that

there was a custom in the manor that such an instrument was a sleeping deed, and wholly inoperative, and that the heir-at-law had been admitted. ANONYMOUS.

*Brougham* contended that if the Court granted the mandamus, the act of the admission would revive the deed, and work injustice to the heir-at-law.

BY THE COURT:

It is a general rule founded on strict justice, that if a party wishes to be admitted for the purpose of trying his title to copyhold premises, we will grant a mandamus to the lord to admit him. The parties cannot be in a better or worse situation by the admission.

*Writ granted.*†

### DUNCAN v. GARRETT AND ANOTHER.

(2 L. J. K. B. 142—143; S. C. at Nisi Prius, 1 Car. & Payne, 169.)

The sheriff sold a vessel and her stores by public auction under an execution. The sails were seized on the premises of a sail-maker. At the time the purchase was completed, in August, 1822, the sheriff gave to the purchaser an order on the sail-maker to deliver up the sails: but he refused, alleging that he had a lien upon them for 60*l.* The purchaser did not, however, inform the sheriff of this refusal until after the sheriff had in due course parted with the purchase money: Held, that the purchaser having subsequently paid a sum of money in discharge of the lien, could not recover it from the sheriff.

1824.  
May 8.  
[ 142 ]

DECLARATION, in assumpsit, that the defendants sold to the plaintiff two-thirds of a vessel, with her stores, as per inventory, by public auction, for 210*l.*; that, at the specified time for completing the contract, the defendants did not deliver to the plaintiff sails, tarpaulin, and canvas mentioned in the inventory; that the sails, &c. were, at the time of the sale, in the possession of J. H. Watson, a sail-maker, who had a lien upon them for 60*l.*; and that the plaintiff, in order to make use of the vessel, was obliged to pay that 60*l.* Second count, That the defendant would not deliver the sails, without saying any thing about Mr. Watson's lien. Plea, General issue.

† So as to admission of two rival claimants. *R. v. Hezham* (Lord of the Manor of) (1836) 5 Ad. & El. 559.—R. C.

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 [ \*143 ]

It appeared at the trial, before the Lord \*Chief Justice, at the sittings after last Term, in London, that the defendants, being sheriff of Middlesex, seized the brig or vessel called *The Swan*, under an execution against the part-owner, Mr. Crossly, and also seized the sails belonging to her, then at the sail-makers; that, on the 15th August, 1822, the plaintiff bought, at a public auction, two-thirds of the vessel and her stores, including the sails at Mr. Watson's; that, on the 23rd August, the purchase-money was paid, and the vessel and almost all her stores delivered to the plaintiff; that on that day an order was given by the agent of the defendants to the plaintiff, directed to Mr. Watson, requesting him to deliver up possession of the sails to the plaintiff; that several applications were made to Mr. Watson for the sails, but he refused to give them up until he had been paid 60*l.* which he said Mr. Crossly owed him; that the writ of execution against Mr. Crossly was returnable the first return of Michaelmas Term, 1822; that, on 22nd April, 1823, a written demand was made on the sheriff to deliver up the sails to the plaintiff, or else the plaintiff would pay the claim of 60*l.* to J. H. Watson for the sails, and hold the sheriff responsible for the same, together with the costs; and that the plaintiff afterwards caused the 60*l.* to be paid to Mr. Watson, and redeemed the sails and other articles.

On the part of the defendants, it was objected that the plaintiff, by accepting the order for the sails, and not making a demand upon the sheriff before he had parted with the proceeds at the return of the writ, had in fact taken upon himself the fulfilment of the order and relieved the sheriff.

The LORD CHIEF JUSTICE assented to the objection, and the jury found a verdict for the defendants.

*Marryat* moved for a rule *nisi* to set it aside.

BY THE COURT :

Is it not the duty of a person purchasing goods from the sheriff to ascertain whether he can have possession of the things? In this case the sale took place in August, 1822, and the plaintiff

must have known that the sheriff would be bound to pay over the proceeds in the following November, and yet no demand is made on the sheriff until April, 1823. The plaintiff ought to have told the sheriff, within a reasonable time after he received the order for the sails, that he could not obtain them. If the sheriff had been informed of the refusal to deliver, he might have redeemed them out of the proceeds of the sale. The plaintiff must be considered as having accepted the order.

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*Rule refused.*

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ROBINSON v. SIR W. WALKER, KNIGHT, SHERIFF, &C.  
(2 L. J. K. B. 144—145.)

1824.  
May 16.

If the sheriff take the goods of one man under an execution against the goods of another person, and restore them before a suit commence, yet an action of *trover* can be maintained against him.

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And if any of the goods are damaged by the omission of some act which the owner would have done if the sheriff had not seized the goods, the sheriff is liable to answer in damages for that injury.

[ 145 ]

DECLARATION, in *trover*, for cattle, goods, and chattels. Plea, Not guilty.

It appeared at the trial, before Hullock, B., at the last assizes for the county of Leicester, that the defendant was the late sheriff for that county; that on the 12th October, 1823, he had seized cattle and goods on premises at Coston House, under an execution against Mr. Phelp; that on the next day he received notice that the cattle and goods belonged to the plaintiff; that the sheriff kept possession until the 10th December following, when the things were delivered up to the plaintiff; but that, in the mean time, a quantity of straw which had been stacked by the servants of the plaintiff, but not wholly thatched, had by the rain been much damaged, although the sheriff's officer desired the plaintiff's servants to do any thing they thought proper for the protection of the straw.

It further appeared, that the plaintiff had been special bail for Mr. Phelp, and had paid the amount of the debt; that an assignment of all his effects at Coston had been made to the plaintiff;

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and that the plaintiff was in notorious possession thereof at the time the execution was levied.<sup>†</sup>

On the part of the defendant, it was objected at the trial, first, that an action of trover could not be maintained after the goods had been returned; and, secondly, that if it could, it ought to be for nominal damages, because the sheriff's officer was not bound to thatch the straw rick.

The jury found a verdict for the plaintiff for 20*l.*; and the learned Judge gave leave to move to enter a nonsuit as to the first point, or to reduce the verdict to a shilling on the second point.

*Vaughan*, Serjt., moved accordingly on the two objections taken at the trial.

BY THE COURT :

There is no doubt but that a party may waive a trespass and bring an action of trover for the injury: and that a suspension of the use of any goods is a sufficient conversion to support the action.

It is a question for the jury, whether the straw sustained any damage or not. They have found that it did. By the seizure, the sheriff superseded the authority of the plaintiff to deal with the property as his own. If the execution had not been levied, the servants of the plaintiff would have thatched the straw rick, and the injury complained of would not have happened. The verdict cannot be disturbed.

*Rule refused.*

<sup>†</sup> As to notoriety of possession, see *Edwards v. Harben*, 1 R. R. 548 (2 T. R. 587); *Wordall v. Smith*, 1 Camp. 332; *Watkins v. Birch*, 4 Taunt. 823; *Benton v. Thornhill*, 17 R. R. 472 (7 Taunt. 149, 2 Marsh. 427); *Armstrong v. Baldock*, 21 R. R. 792 (Gow, N. P. 33).

WILLIAM DRURY LOWE *v.* LORD HUNTING-TOWER.

(2 L. J. K. B. 164—168.)

1824.  
May 18, 21.

[ 164 ]

Richard Lowe, by his will, dated 5th February, 1781, gave all his property, real and personal, to three trustees and executors: he then warned his executors to make early applications, in order to get in his personal property or it would be lost; then he gave 10,000*l.* to his daughter, Charlotte, on condition that she married with consent of two of the trustees; but in case she should marry one of three kinsmen, William, Thomas or John Drury, then he gave him certain estates on taking the name of Lowe; but in the event of her not marrying either of them, then he gave those estates to any one of the sons of Edward M. Mundy on the same condition; then he gave the remainder of his property to the person, having a certain property himself, who should marry either of his daughters, for ever, on taking the name of Lowe.

And in case neither of his daughters married as above described, then he gave all his property to William Drury, and his heirs, on taking the name of Lowe irrevocably.

At the date of the will the plaintiff, then William Drury, was a bachelor, and Ann, the testator's younger daughter, was fourteen years old. Edward M. Mundy had five sons, of whom the eldest was then seven years old.

The testator, on 25th May, 1785, made a codicil, reciting the marriage of his daughter, Charlotte, and that he had given her 10,000*l.*, and provided for her children. He thereupon revoked his will as to her. Then he gave to his younger daughter, Ann, the same choice of marrying into the favoured families of Drury and Mundy, or a person with a certain property; and if she did not, then she was to have 10,000*l.* Ann came of age in 1788, and in the following year married a gentleman not within the description of the will or codicil. At that time the plaintiff was a married man.

The Court held, that on the marriage of Ann, and William Drury taking the name of Lowe, he took an indefeasible estate in fee-simple.

THE former hearing and decision of this case, sent by the VICE-CHANCELLOR, under the name of *Lowe v. Sir William Manners, Bart.*, is reported in 24 R. R. 613 (5 B. & Ald. 917).

THE LORD CHANCELLOR made an order, on 1st November, 1822, that the case should be amended and referred back to the judges for their opinion, whether the facts thereby ordered to be introduced are admissible as evidence; and if so, whether, in the case so amended, they are of the same opinion as before certified by them?



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 [ \*165 ]

The following statement is the amended \*case. Those parts which were introduced in the amendment of the original case are placed between inverted commas : thus “ — ”

Richard Lowe, of Locke, in the county of Derby, Esquire, being seised in fee-simple of an undivided moiety of the wood and woodlands called North Witham Wood, and of several closes in North Witham and elsewhere, in the county of Lincoln, and of other freehold estates in the counties of Derby, Bedford, Wilts and Middlesex, duly made and published his last will in writing, bearing date the 5th day of February, 1781, and duly executed and attested it so as to pass freehold estates, part whereof was in the following words (that is to say), as to my worldly effects I will and devise as follows : I give all my landed estates, in the different counties of Derby, Bedford, Lincoln, Wilts and Middlesex, to my three worthy friends, viz. Edward Miller Mundy, Esquire, of Shipley, in the county of Derby ; Robert Williams, of Birchin Lane, in the city of London, banker, and Kempe Brydges, junior, of Bedford Street, Covent Garden, in the county of Middlesex, laceman, for the uses hereinafter mentioned, appointing them executors of this my last will.

“ And whereas, at this time, I cannot ascertain or put a proper estimate on my personal estate and variety of securities due to me, owing to the abuse of wicked and designing men, and, consequently, the getting in debts and securities due to me is precarious, and may fall short of what is justly due to me ; at the same time, I can have no doubt but it must be very considerably more than my debts and legacies can amount to, I will and desire my aforesaid executors will exert themselves in early applications, as from too much experience I have found that delays are dangerous, and no confidence to be put in specious appearances and promises ; and that as soon as my debts and legacies aforesaid are discharged, I will, that as soon as they shall have the sum of 500*l.* in their hands, it shall be laid out on good security till it arrives to the sum of 5,000*l.*, and then laid out in land, in or as near to the parish of Derby as they meet with a purchase ; and the next 5,000*l.* to be laid out in land in the parish of Spoonndon or Chaddeston, and as contiguous to Locke as a purchase may offer, and so ultimately as it may arise.”

10,000*l.* I give as a portion to my daughter, Charlotte Layton, otherwise Lowe ; 5,000*l.* of which to be paid on the day of her marriage, and 5,000*l.* in one year after, on condition she marries, with the consent of any two of my aforesaid executors, to a man of character and fortune sufficiently unencumbered to make a proper settlement upon her ; but in case she should marry with her own consent, any one of my three kinsmen, William, Thomas or John Drury, her choice beginning with the eldest, then Thomas, and then John, my will is, that if any one of them takes place, I will that which ever of them she chooses, I give him all the Derby and Locke estates on taking the name of Lowe, and settling one annuity or rent-charge of 1,000*l.* a year during her life ; and in case the aforesaid circumstance should not take place with my daughter, Charlotte, I then will that it may be offered to my daughter, Ann Layton, otherwise Lowe, in every particular, and I charge the aforesaid estates in Bedfordshire, Lincoln and Wilts with the aforesaid 10,000*l.*, on the special conditions aforesaid, to either of them that shall not marry as aforesaid ; and should neither of the above marriages take place, I will that one, or any one, of the sons of my executor, Edward Miller Mundy, and a liking take place, that on their taking the name of Lowe, and making the same settlement, the estates shall be theirs, and their heirs-male for ever ; and whereas the above estates are at present charged with an annuity of 1,000*l.* during the life of my brother's widow, Mrs. Sidney Lowe, I will that the income of the remainder of my fortune shall be the property of the person who marries either of my aforesaid daughters, and his heirs for ever, taking the name of Lowe, and that the entail be continued on all my fortune, not to be disposed of or mortgaged, but for the sole use of the income only to the name of Lowe for ever ; and should it so happen that neither of my aforesaid daughters should marry in the manner I have mentioned, or to some worthy good man of an estate in fee, of not less than 500*l.* in land, or real property, unencumbered of 10,000*l.*, I will that my said daughters have 10,000*l.* each, \*to be paid by my executors at such time as they, or any two of them, think proper ; and then I give all my estates, both landed and personal, to my kinsman, William

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Drury, and his heirs-male for ever, on his and his heirs taking the name of Lowe irrevocably.

“At the date of the said will, the plaintiff (in the said will named by the name of William Drury) was a bachelor, the said Ann Layton, otherwise Lowe, had attained the age of fourteen years, and Edward Miller Mundy (in the said will named) had five sons, namely, Edward Miller Mundy, the younger, aged seven years, Godfrey Basil Meynell Mundy, aged six, George Mundy, aged four, Frederick Mundy, aged three, and Henry Mundy, aged two years, or thereabouts.”

After the date of the said will, the said Charlotte Layton, otherwise Lowe, married William Heath; and upon the occasion of that marriage, the said Richard Lowe paid her a marriage portion.

The said Richard Lowe afterwards made and published a codicil in writing to his said will, bearing date the 25th day of May, 1785, and duly executed and attested it so as to pass freehold estates, part whereof was in the following words, that is to say: This is a codicil to the last will and testament of me, Richard Lowe, Esquire, and to be taken as part thereof; whereas in and by my last will and testament, bearing date the 5th day of February, 1781, I have nominated and appointed Edward Miller Mundy, of Shipley, in the county of Derby, Esquire; Robert Williams, of Birch Lane, in the city of London, banker, and Kempe Brydges, junior, of Bedford Street, Covent Garden, in the county of Middlesex, laceman, my trustees and executors. Now I hereby revoke that nomination and appointment, and hereby nominate and appoint the said Edward Miller Mundy, together with John Radford, of Smolley, in the county of Derby, Esquire, and Evan Lewis, of Covent Garden, in the county of Middlesex, woollen draper, executors of my last will and testament; and I give, devise and bequeath unto the said Edward Miller Mundy, John Radford and Evan Lewis, and their heirs, all my real and personal estates in the several counties of Derby, Bedford, Lincoln, Wilts and Middlesex, to hold to them and their heirs, to the use of such person, and upon such events, and under such conditions, and subject to such charges, as are mentioned and declared in and by my said last will and testa-

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ment; and whereas, since the making of my said will, one of my daughters, namely, Charlotte Lowe, otherwise Layton, hath intermarried with William Heath, Esquire, on which marriage I gave my said daughter, Charlotte Lowe, otherwise Layton, now Heath, a fortune, therefore I do hereby revoke and make void all the devises and bequests contained in my said will, for the benefit of my said daughter, Charlotte Heath; and I do hereby also revoke and make void all claim and right which the said William Heath might have to any of my real and personal estates, by virtue of his said marriage with my said daughter, Charlotte Heath, and under and by virtue of any devise or clause in my said will, or any construction thereof, and in lieu thereof, I give and bequeath unto each of the children of the said William Heath, to be begotten on the body of my said daughter, Charlotte Heath (except an eldest or only son), the sum of 2,000*l.*, to be paid to such of them as shall be a son or sons at the age of twenty-one years, and to such of them as shall be a daughter or daughters at the age of twenty-one years, or day of marriage, which shall first happen; and I hereby charge my real estates with the payment thereof; and in case my other daughter, Ann Lowe, otherwise Layton, should marry either of the gentlemen, and in the manner mentioned in my said will, then, and in such case, and upon this express condition, that either of those gentlemen whom she may so marry, and his heirs, will accept, take and use the name of Lowe only, I give all my real and personal estates, subject to my debts, funeral expenses and legacies, and also subject to a rent-charge of 1,000*l.* per annum, to my said daughter, Ann Lowe, otherwise Layton, for her life, and independent of her husband, unto such of those gentlemen whom she may so marry, and his heirs; and in case my said daughter, Ann Lowe, otherwise Layton, shall not choose to marry either of those gentlemen who I have mentioned in my will for that purpose, or if she does marry one of them and he \*should refuse to accept, take and use the name of Lowe, then, and in such case, I do hereby revoke all devises and bequests contained in my said will, and this my codicil, to my said daughter, Ann Lowe, otherwise Layton, and in lieu thereof, I give and devise unto her 10,000*l.*, to be paid to her at her age

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of twenty-one years, or day of marriage, which should first happen; and in the mean time, and until the said 10,000*l.* shall become payable, I direct my executors to pay unto my said daughter, Ann Lowe, otherwise Layton, 3*l.* per cent. per annum for the same, and I hereby charge my real and personal estate with the payment of the said 10,000*l.*, and the interest thereof as aforesaid; and in all respects subject and conformable to this codicil, I do confirm my last will and testament.

“At the date of the said codicil, the plaintiff was a married man, and all the said sons of Edward Miller Mundy, the elder, were living and bachelors.”

Soon after the date of the said codicil, the said Richard Lowe died. In the year “1788, the said Ann Layton, otherwise Lowe, attained the age of twenty-one years,” and in the year 1789, she married the Honourable Thomas Fane, who, at the time of the marriage, had not an estate in fee of not less than 500*l.* in land, or real property, unencumbered of 10,000*l.*; and upon the occasion of that marriage, the portion of 10,000*l.* given to her by the said codicil of the said Richard Lowe, was paid to her out of his personal estate, and the said William Drury Lowe, then William Drury, entered into possession of the testator’s undivided moiety of the said wood and woodlands, and closes, in the county of Lincoln, and of his other freehold estates, and took upon himself the name of Lowe in addition to the name of William Drury.

“At the time when the said Ann Lowe, otherwise Layton, attained the age of twenty-one years, and at the time of her said marriage, the plaintiff was a married man.”

In Michaelmas Term, 1790, the said William Drury Lowe duly suffered a common recovery, with double voucher of the said undivided moiety of the said wood, woodlands and closes; which common recovery was declared to enure to the use of the said William Drury Lowe, his heirs and assigns.

The said William and Charlotte Heath, and Thomas and Ann Fane, and the said William, Thomas and John Drury, and several sons of the said Edward Miller Mundy are now living.

The said plaintiff, William Drury Lowe, contracted to sell the said undivided moiety of the said wood, woodlands and closes, to

the said defendant, Lord Huntingtower, and filed his bill in the High Court of Chancery against the defendant for a specific performance of the contract.

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*Tindal*, for the plaintiff, contended, first, that the facts, independent of the will, were not admissible in evidence; and, secondly, if they were, that would not warrant any alteration in the opinion already certified by the Court. He cited *Lord Cheyney's case*,† *Cole v. Rawlinson*,‡ *Stapleton v. Colville*,§ *Low v. Fyldes*,|| *Doe dem. Turner v. Kett*,¶ *Jeacock v. Falkener*,†† *Goodtitle v. Edmonds*,‡‡ *Bootle v. Blundell*,§§ *Andreus v. Emmot*,||| *Nannock v. Horton*,¶¶ *Fonnereau v. Poyntz*,††† and contended that the testator, by giving Charlotte the 10,000*l.*, evidently did not mean that his daughter should have the choice after they had been once married.

BAYLEY, J. :

You cannot give evidence to explain the meaning of the testator, but you may give evidence as to the substance, whether the thing claimed is that which is devised, or as to the person, as his age, situation in life, &c.

*Tindal* :

The evidence here offered is to explain the meaning of the will in a part which has not a latent ambiguity: *Doe v. Dring*.‡‡‡

*Hazlewood*, for the defendant, contended that the direction in the will as to the marriage of the younger daughter was \*doubtful, and that the facts introduced are safe and sound evidence. He cited *Harris v. The Bishop of Lincoln*,§§§ *Cuthbert v. Peacock*,|||| *Goodinge v. Goodinge*,¶¶¶ *Hampshire v. Peirce*,††††

[ \*168 ]

† 5 Co. Rep. 68.

‡ 1 *Ld. Raym.* S. C. 1 *Salk.* 234.

§ 1 *Rep. temp. Lord Talbot*, 201.

|| *Cowp.* 840.

¶ 2 *R. R.* 475 (4 *T. R.* 601).

†† 1 *Bro. Ch. Cas.* 295.

‡‡ 7 *T. R.* 635.

§§ 15 *R. R.* 93 (1 *Mer.* 193).

|||| 2 *Bro. Ch. Cas.* 297.

¶¶¶ 7 *Ves.* 391.

††† 1 *Bro. Ch. Cas.* 471.

‡‡‡ 15 *R. R.* 308 (2 *M. & S.* 448).

§§§ 2 *P. Wms.* 136.

||||| 2 *Vern.* 593.

¶¶¶¶ 1 *Ves. sen.* 231.

†††† 2 *Ves. sen.* 216.

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*Bucher v. Samford*,<sup>†</sup> *Wilde's case*,<sup>‡</sup> *Shaw v. Bull*,<sup>§</sup> *Doe d. Ryall v. Bell*,<sup>||</sup> and he contended that the children of Mr. Mundy were so very young, that it was clear the testator contemplated a second marriage, which might yet take place with that family.

*Tindal* was heard in reply.

The Court certified to the Court of Chancery, that the facts introduced into the amended case were admissible in evidence, but that the effect of them did not alter their former opinion.



1824.  
 June.

# BELL AND ANOTHER v. ROBINSON AND ANOTHER.

(2 L. J. K. B. 192—193.)

[ 192 ]

The occupier of a farm, upon the coming in of two executions and a distress for rent, notoriously assigned all his property (except a lease) to two persons in trust, to satisfy those executions and the distress, and to pay his creditors rateably, and all the rates and taxes, and in trust to pay the surplus (if any) to himself, whereupon the sheriff left his premises.

The overseer and constable afterwards distrained for poor-rates, and the Court held that the assignment was good in law,<sup>¶</sup> and in an action against the overseer and constable, no demand of the warrant under 24 Geo. II. c. 44<sup>††</sup> was necessary.

DECLARATION, in trover, for cows, waggons and ploughs, which the defendants had taken and converted to their use. Plea, General issue.

It appeared, at the trial before Onslow, Serjt., at the Summer Assizes, 1823, for the county of Essex, that Thomas Salmon had been the occupier of a farm in the parish of Runwell in that county; that two executions and a distress had, prior to the 6th day of September, 1822, been put in on the farm and premises;

<sup>†</sup> Gouldborough's Rep. 99.

<sup>‡</sup> 2 Co. Rep. 16. See Cro. Car. 293; 3 Keb. 49, and 1 Freeman's Rep. 479.

<sup>§</sup> 12 Mod. 64.

<sup>||</sup> 8 T. R. 579.

<sup>¶</sup> It is to be observed there was no question arising upon Bankruptcy. —R. C.

<sup>††</sup> See also now Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). —R. C.

that Salmon, by an assignment, bearing date on that date, sold, assigned and transferred all his property (except his wearing apparel and the lease of other premises), unto the plaintiffs, to whom he was indebted, in trust, to satisfy the executions and rent, to pay all rates, taxes and assessments, and wages whatsoever then due, or which should become due, and then to distribute the money among the creditors, who were made parties to the assignment rateably, and in proportion to their debts, and if there should be any surplus, to transfer the same back again to Thomas Salmon; that no creditors signed the deed, and that possession was taken of the farm and property by the plaintiffs, who employed Salmon, at the wages of two guineas a week, to assist in the management of the farm, and that it was notorious in the neighbourhood that assignment had been made.

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v.  
ROBINSON.

It further appeared, that the defendants, being the overseer and the constable of the parish of Runwell, had levied distresses \*for poor-rates on the goods on the premises, on the 18th and 21st days of December, 1822, and a distress for a county rate, on 28th December, 1823; that the warrants directed them to distrain the goods and chattels of Thomas Salmon.

[ \*193 ]

It also appeared that it was notorious that the assignment had been made.

The jury found a verdict for the plaintiff.

*Marryat*, in support of a rule for entering a nonsuit, contended, first, that the deed was a fraud in law, and that inasmuch as Salmon had an interest in the goods and chattels, they could be distrained for the amount of these rates; and, secondly, that the defendants were protected by 24 Geo. II. c. 44, because no demand of the warrant had been made before action brought. He cited *Parton v. Williams*,† *Harper v. Carr*,‡ *Smith v. Wiltshire*,§ *Clarke v. Davey*.||

BY THE COURT :

We are of opinion that this rule must be discharged, and that the plaintiffs are entitled to a verdict. The jury have found

† 22 R. R. 414 (3 B. & Ald. 330).

§ 23 R. R. 521 (2 Brod. & Bing. 619).

‡ 4 R. R. 440 (7 T. R. 270).

|| 4 Moore, 465. See 2 Burr. 1152.



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ROBINSON.

that, as to the assignment of the property, there was no fraud in fact. Can we say that there was any fraud in law? It is clear, that two executions and a distress for rent had been put in on the premises of Salmon, and that the plaintiffs undertook, upon having the property assigned to them, to satisfy the executions and rent. There was then a good consideration for the assignment, of which the object was to pay all the creditors. It is said, that inasmuch as these defendants never considered the plaintiffs as their debtors, that the assignment is of no avail as against them. But we think that the consideration being good, and the object of it praiseworthy, that it is good in law to transfer the property, particularly as it provides for the rates; and the circumstance that none of the creditors signed the deed, does not make any difference : *Pickstock v. Lyster*.†

On the second point, the case of *Money v. Leach*,‡ and *Bell v. Oakley*,§ are decisive, for no demand can be necessary unless the warrant is a protection to the officer, and the action would lie against the magistrate, for then the officer acts *colore officii*, and in obedience to the warrant. In this case they were directed to distrain the goods and chattels of Salmon, and they took those belonging to the plaintiffs.

*Rule discharged.*

1824.  
Oct.

## LOUTH AND OTHERS v. ENDERBY.||

(3 L. J. K. B. 23—24.)

[ 23 ]

A landlord and tenant entered into an agreement for renting a farm. The landlord covenanted that he or the in-coming tenant should pay for the work and seeds of the off-going crop. By the custom of the country the in-coming tenant was bound to pay for such labour and seeds. The landlord did not pay for them.

The off-going tenant brought an action on the custom, against the in-coming tenant, for a compensation.

The Court held that the agreement did not furnish a defence to the action; but that the in-coming tenant was liable.

DECLARATION, in assumpsit, that the plaintiffs were tenants to Charles Burrell Massingberd, of a farm containing (inter alia) 50 acres of arable land at Skegness, in the county of Lincoln,

† 16 R. B. 300 (3 M. & S. 371).

‡ 3 Burr. 1742.

§ 15 R. B. 238 (2 M. & S. 259).

|| Cp. *Bradburn v. Foley* (1878)

3 C. P. D. 129, 47 L. J. C. P. 331.

and according to the due course of husbandry used in that county, the tenant of every farm containing arable land, not being restricted from so doing by special agreement, has been accustomed to bestow his labour and expense in manuring, tilling, fallowing, sowing with wheat, all such lands of his farm as in the due course of husbandry there \*used to be fallowed and sown, hath been accustomed at his own expense to provide all necessary things used thereon, and in case the tenant of such farm quitted the same, without having received the benefit of such fallowing, &c. then the next in-coming tenant of such farm, not being exempt therefrom by any special agreement, hath been accustomed to make such off-going tenant (he having cultivated such farm according to the due course of husbandry), a reasonable compensation in respect of such manuring, &c. of which the out-going tenant hath not received the benefit. And also to pay such off-going tenant one year's rent, and all taxes and assessments for one year, payable for the said lands so fallowed and sown. Averment, that the plaintiffs occupied the farm until 6th April, 1823, when they quitted and the defendant became the in-coming tenant. That they manured, &c. 20 acres of arable land in the course of good husbandry; that the defendant became liable to pay a reasonable compensation for it, with the rent and taxes of the land for one year, but that the defendant, after notice, refused so to do. Plea, General issue.

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ENDERBY.

[ \*24 ]

It appeared at the trial before Garrow, B., at the Summer Assizes, 1823, for the county of Lincoln, that the plaintiffs had taken the farm at Skegness from Mr. Massingberd, as tenants from year to year, by an agreement dated 26th March, 1822, which contained among other covenants, one that C. B. Massingberd, his heirs, executors, or administrators, or his or their in-coming tenant, should and would pay unto the plaintiffs, their executors and administrators, for all seeds which had been sown by them, in the year preceding the determination of the demise, and for the labour of sowing the same, and also for the fallows, at a valuation to be made by two indifferent persons, or their umpire.

It also appeared that the plaintiffs held the farm but one year; that they manured, fallowed, and sowed 14 acres of the arable

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ENDERBY.

land with wheat, of which the defendant being the in-coming tenant, had the benefit, for which the plaintiffs claimed a compensation, and also one year's rent and taxes.

It further appeared that the custom of the country was as stated in the declaration, except as to the rent and taxes; that the defendant had at one time appointed an arbitrator to settle the amount of the claim, who fixed it about 89*l*.

It was objected on the part of the defendant that the agreement had taken the case out of the custom of the country, and consequently that the evidence did not support the pleadings.

The learned Judge directed the jury to find a verdict for the plaintiffs, which they accordingly did for 41*l*. 2*s*. 6*d*. thus not giving any thing for the rent and taxes.

*Vaughan*, Serjt., had obtained a rule *nisi* for a new trial, or for entering a nonsuit on the objections taken at the trial.

*Denman*, C. S. and *C. M. Phillipps* shewed cause, and contended that the custom of the country was quite independent of the agreement.

BY THE COURT :

This action is founded on the custom of the country, respecting the rights of out-going tenants for a remuneration for work and seeds of which the in-coming tenant had the benefit. By that custom the out-going tenant is entitled to a compensation for work done, and the seeds sown, but he is not entitled by it to the rent and taxes of the land. Here the landlord has covenanted, that he or the in-coming tenant shall pay such compensation. The in-coming tenant is not a party to that agreement, and therefore the custom prevails against him. And inasmuch as the landlord has not paid it, the in-coming tenant is bound by law to pay a reasonable sum of money for the work and seeds, of which he has taken the benefit.

*Rule discharged.*

PRICE *v.* BULLEN, GENT.

(3 L. J. K. B. 39.)

1824.  
Nov. 8.

[ 39 ]

The father of a party to a cause was a material witness. The attorney did not serve him with a subpoena, but the witness was told that he must attend the trial on the following day. The verdict was lost in consequence of his non-attendance.

The Court held that the attorney had not been guilty of such negligence as that an action would lie against him.

DECLARATION, in assumpsit for negligence as an attorney, for not using due and proper care to procure the attendance of the father of the plaintiff, at the trial of the cause of *Hay v. Price*, as a witness for the present plaintiff, whereby a verdict was given against him. Plea, General issue.

It appeared at the trial before the Lord Chief Justice, at the sittings in London, after Trinity Term, 1824, that the cause of *Hay v. Price* stood in the paper for trial, on Saturday the 1st of March; that upon an affidavit, the cause was put off till Monday the 3rd of March, upon payment of the costs of the day; that the defendant was an attorney at Southend, in Essex, where the parties in the original cause resided; that the agents in town sent a parcel to the defendant on the preceding Friday, which he did not receive until the Sunday; that he then immediately informed the plaintiff that he must take his witnesses to town directly, and with them his father, who was a material witness to prove the register of baptism, to show that Hay was a minor; that the cause of *Hay v. Price* was tried in the absence of Price the father, who, in fact, would not go to London, and for want of his evidence a verdict passed against the plaintiff.

It further appeared that the attorney for Hay in the first action, was the attorney for the plaintiff in the present one.

The jury, under the direction of his lordship, found a verdict for the defendant.

*Gurney* moved for a new trial, and contended that it was the duty of the defendant to have given a subpoena to Price the father, long before the trial could have come on.

PRICE  
c.  
BULLEN.

BY THE COURT :

It is somewhat singular that the attorney against this plaintiff in the former action, should be his attorney in the present one ; and there can be no doubt that that fact had considerable weight with the jury. We cannot say that the defendant has been guilty of gross negligence. If the parcel had not miscarried, the witnesses would have been in proper time. We do not wish to encourage the practice of subpoenaing witnesses, and delivering briefs to counsel just at the time a cause is to be tried. But what can an attorney do ? he is not allowed to have his witnesses here at a great expense, for an unnecessary time before the trial.

We do not think that the defendant has been guilty of negligence, or that we ought to disturb the verdict.

*Rule refused.*

1824.  
Nov. 11.

SIMMS AND ANOTHER, EXECUTORS OF JOHN SIMMS,  
v. JOHN COX.

[ 44 ]

(3 L. J. K. B. 44—45.)

Executors brought an action of trover to recover possession of a promissory note, which it was said had been given by the deceased to a confidential female servant, who claimed it as *Donatio mortis causâ*. The jury found a verdict for the plaintiffs.

The Court would not grant a new trial, observing that it required a strong case to rebut a suspicion of fraud, when the party had access to keys and drawers.

DECLARATION, in trover for a promissory note for 100*l.*, which John Simms in his lifetime had lost, and which the defendant had converted to his own use. Plea, General issue.

It appeared at the trial before Park, J., at the Summer Assizes, 1824, for the county of Oxford, that the deceased John Simms was, for some time prior to his death, in a very infirm state of health ; that the wife of the defendant, then unmarried, was his servant, and accustomed to wait upon him ; that he often expressed himself highly pleased with her attentions, and that he \*would reward her for them ; that a short time prior to his death, he delivered the note in question to the defendant, having first indorsed it, saying, “ If I get better, you must return it to me ;

[ \*45 ]

but if I die, you are to keep it;" and that he soon afterwards died.

It further appeared that the keys of the drawers could easily be procured by the wife of the defendant; and it was imputed to her that she had obtained the note by fraud.

The jury, under all the circumstances of the case, found a verdict for the plaintiffs.

*Taunton* moved for a rule *nisi* for a new trial; and contended that this was clearly a *donatio mortis causâ*.

BY THE COURT :

We cannot say that the jury have come to a wrong conclusion on the question left to them, whether this was a *bonâ fide* transaction or not. It requires a strong case to rebut a suspicion of fraud, when the party has access to keys and drawers.

*Rule refused.*

## THE KING v. JOHN GITTUS AND OTHERS.†

(3 L. J. K. B. 55.)

When the Court of King's Bench grants a *habeas corpus* that a prisoner may be admitted to bail for a crime, they always direct a *certiorari* to issue, to bring the depositions into that court.

If the party is poor, they will order him to be bailed before two magistrates in the country.

*GODSON* moved for a *habeas corpus* to bring up the body of John Gittus, a prisoner confined in the gaol at Worcester, that he might be admitted to bail.

It appeared that John Gittus and others had been found guilty, on a coroner's inquisition, of manslaughter; but that there were many circumstances to show that he was innocent of the crime.

*Godson* prayed that, as the party was poor, he might be bailed before two magistrates in the country.

† See modern procedure rules, Crown Practice, p. 378.—R. C. C. O. R. 122, 235, 237, and Shortt,

SIMMS  
r.  
COX.

1824.  
Nov. 6.  
[ 55 ]

THE KING      BY THE COURT :

c.  
GITTUS.

Let a rule be served on the coroner and the next of kin of the deceased man ; and at the same time let a writ of *certiorari* issue to remove the inquisition and depositions into this Court.

As the party swears that he cannot bear the expenses of a journey to London, let the rule be drawn up that he may be admitted to bail before two magistrates in the country.

*Rule accordingly.*

1825.  
April 22.

## READ v. GODWIN.

(3 L. J. K. B. 128—129.)

[ 128 ]

Defendant came into possession of a house, under one R., in 1807. The property, in 1817, became vested in the plaintiff under a conveyance from the trustees under the Lottery Act, 46 Geo. III. c. 97.† No rent was ever paid to the plaintiff, but he recovered in ejectment.

In an action for use and occupation, held that the plaintiff might recover ; because the Act of Parliament created a privity of estate between the defendant and the trustees, to whom the title (such as it was) of R. was transferred by the operation of the Act.

[ 129 ]

DECLARATION, in assumpsit for use and occupation of a house in Skinner-street, London, from Midsummer 1817, to Midsummer 1819.

At the trial before Abbott, Ch. J., at the London sittings, the plaintiff had a verdict. .

*Joshua Evans* now moved for a rule *nisi* for a new trial, on the ground, that the action for use and occupation would not lie under the circumstances made out in evidence. Defendant came into possession of the house in question in 1807, under one Rolfe, and paid him two quarters' rent. It was then disposed of under the Lottery Act, 46 Geo. III. c. 97, s. 7, which received the royal assent on 3rd July, 1806.† No rent had been paid

† By 46 Geo. III. (local and personal) c. 97 (An Act to enable certain persons to dispose of certain houses in Pickett-street, Skinner-street, &c. by lottery,) it is enacted, s. 7, " That the right and property of the owners of such of the buildings

and hereditaments as are to be comprised in the lottery, shall be vested in and settled upon the trustees of this act, their heirs and assigns, so that they may stand and be seized of the fee simple and inheritance of and in the same, discharged from certain

to the trustees named by the Act, or to any other person after the trustees had executed the conveyance to the plaintiff, on the 13th August, 1817; but the trustees brought an ejectment against the defendant; and on recovering in that action brought another action for mesne profits, from 1st January, 1820, to 4th May, 1822. Thus Rolfe's title as landlord had ceased, and the defendant was at liberty to show that;† though a tenant cannot in general controvert his landlord's title; besides this action will not lie, unless there is evidence of a contract for permissive enjoyment.‡

READ  
v.  
GODWIN.

#### By THE COURT :

There is a privity of estate between the trustees, who derived title from Rolfe by virtue of the Act of Parliament, and the defendant, for he was in by Rolfe. The action lies.

*Rule refused.*

leases and incumbrances, in trust for the Mayor, &c. of the city of London, till the determination of the chances, by the drawing of such lottery; and immediately after such drawing, in trust for the respective holders of the fortunate tickets, as to the prizes allotted to every such ticket respectively; and the same shall become the property of, and be conveyed free of charge to the bearers of the said tickets respectively, who shall be entitled to the rents, payable on their respective prizes, from the last quarterly day of payment thereof, preceding the drawing of such prizes respectively, and the purchase of the said premises by the said Mayor, Aldermen, and Commons, in common

council assembled, and the production of the conveyance of the said premises, to the said mayor, and commonalty, and citizens, shall be, and be deemed and taken to be, a sufficient title thereto, to the respective holders of the several fortunate tickets."

Note.—This Act was amended by 49 Geo. III. c. 70, and 52 Geo. III. c. 175.

† *England d. Syburn v. Slade*, 2 R. R. 498 (4 T. R. 682) *Doe d. Jackson v. Ramsbotham*, 3 M. & S. 516.

‡ 1 Vernon & Scriven's Rep. 268; 2 Smith's Rep. 19; *Pulteney v. Warren*, 5 R. R. 226 (6 Ves. 72, 88); per BULLER, J. in *Birch v. Wright*, 1 R. R. 223 (1 T. R. 378-387).



## EXCH. TRINITY TERM.

FECTOR AND OTHERS *v.* PHILPOTT AND OTHERS,  
AND THE ATTORNEY-GENERAL.

(By ORIGINAL BILL AND BILL OF REVIVOR.)

(12 Price 197—212.)

An agreement on borrowing (by recital in a bond) money, on the part of the borrower, that certain real property (freehold and leasehold) should stand pledged for repayment of it, and a delivery of the title-deeds, amounting in equity to a mortgage, or right to a mortgage, creates a lien binding as against the prerogative lien of the Crown in respect of a debt accruing due to the King subsequently: and the equitable mortgagees are entitled to be first paid their principal and interest out of the produce of the sale of the premises, the property of the Crown debtor, seized under an extent in chief.

Where part of the property so equitably pledged was leasehold, renewable by the lessee, and the equitable mortgagee had procured a renewal of the lease in the name of the lessee (the Crown debtor), by surrendering the original lease and taking a new one of the same premises after the Crown debt had accrued—such new lease, and the premises leased thereby, held to be subject to the equitable lien on the old lease, and the lien to be preferable to the demand on the part of the Crown against the Crown debtor in respect of priority of satisfaction out of the proceeds of the sale.

A further debt, so agreed to be secured by pledge of the property so equitably mortgaged, is also tantamount to a further equitable mortgage; and possession of the deeds by the first mortgagee is a possession by the second.

It was prayed by the original bill, that an account might be taken under the decree of the Court, of what was due to the plaintiffs claiming a lien on the security of the premises in the bill mentioned, for principal and interest, in respect of the several sums of 250*l.* and 1,400*l.*;—and of the monies received from the sale of such part of the said premises as had been sold; and of what, if any thing, was due to John Upton for principal \*and interest upon the security of the premises mentioned in the bond referred to in the bill as being in mortgage to him, Upton; and that, after payment to Upton of what should be found due to him out of the proceeds

1823.

*June 5.**Exchequer  
Chamber.*

[ 197 ]

[ \*198 ]

of the sale of the premises so in mortgage to him, the residue of such proceeds, and all other monies produced by the sale of such parts of the remainder of the said premises so pledged to the plaintiff Fector, might be paid to him.

FECTOR  
v.  
PHILPOTT.

The original bill stated, that in August, 1811, the plaintiff Fector advanced and lent to the defendant Philpott 1,400*l.* of the effects of the plaintiffs in the first suit, who were co-partners in business at Dover and in London; and that the defendant Philpott had agreed to secure the repayment thereof on certain freehold and leasehold estates mentioned in a certain bond executed by him to the plaintiff Fector for that purpose, on the 10th of August, 1811.

That bond recited the loan of the 1,400*l.*, and that the defendant Philpott was and stood seised in fee simple of the freehold property therein mentioned (describing it locally), then recited to be in mortgage to the defendant Upton, for securing 300*l.* and interest; and also reciting the seisin of Philpott in other real property in fee (describing it), and his possession of certain leasehold property held under the Warden and Assistants of the Harbour of Dover; which last-mentioned premises were recited to be mortgaged to Fector for securing 250*l.* and interest: and it \*was also recited thereby, that whereas the said John Philpott, in order to secure the repayment of the said sum of 1,400*l.*, had that day deposited in the hands of the said J. M. Fector the title-deeds of the said several messuages or tenements, parts, shares, and hereditaments in (&c.), had agreed to enter into that present security; the condition was (&c.)—in substance, that, if the principal, with interest, were not paid by the 10th August following, the obligor would well and effectually convey, assign, and assure to the obligee, or his appointee, all the freehold and leasehold property, with full power to sell all, or so much thereof as should be sufficient to raise and pay to Fector the 1,400*l.*, or so much thereof as should be then due, with all costs, charges, and expenses; and that, in the mean time, the title-deeds of the same property were to be permitted to remain in the possession of the obligee (Fector) as a pledge or security for the repayment of the 1,400*l.* and interest, so long as the same, or any part

[ \*199 ]

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c.  
PHILPOTT.

thereof, should remain due and unpaid: and also, that all and singular the said freehold and leasehold messuages, parts, shares, and hereditaments, should from thenceforth be deemed and considered, construed and held, subject to the [then] present mortgages thereon, for the said sums of 300*l.* and 250*l.* and interest.

[ \*200 ]

The bill then stated, that all the title-deeds, evidences, and writings relating to the said freehold and leasehold estates (save and except the \*premises in mortgage to the said John Upton, the title-deeds with respect to which were in the possession of the said John Upton,) were delivered to and deposited with the plaintiff John Minet Fector by the said John Philpott, at the time of the execution of the said bond or agreement.

That the sum of 250*l.* in the condition of the said bond mentioned to be due to plaintiff John Minet Fector, upon the security of the said leasehold premises, was, in fact, justly due and owing to the plaintiff upon the security thereof, in trust for himself and his said partners; and the said two sums of 250*l.* and 1,400*l.*, or either of them, or any part thereof, had not been at any time paid or satisfied; but the said sums respectively, with a large arrear of interest thereon respectively, still remained due and owing to the plaintiffs, as the surviving partners of the said John Hughes Minet and Peter Fector.

[ \*201 ]

That, in the year 1815, the said lease, under which the said leasehold premises were now held, was surrendered to the lessors for the purpose of obtaining a new lease, and the old lease was accordingly delivered up by the plaintiff J. M. Fector, and a new lease was granted of the same premises by the Warden and Assistants of the Harbour of Dover, dated the 8th day of January, 1814, to the said J. Philpott; and such new lease was granted for a long term of years; and that it was delivered to the plaintiff's agent, Mr. Shipdem, of Dover (who was also registrar), to hold for the plaintiff \*J. M. Fector, upon the same trusts, and subject to the same lien or mortgage, as the old lease; and that such old lease had been delivered up by the plaintiff John Minet Fector, in consideration of having the new lease delivered over to him.

That Philpott, after the execution of the said bond, became collector of the property and assessed taxes for the pier division of Dover ; and, in the year 1815, having become considerably in arrear to his Majesty in respect of his receipts as such collector, a writ of extent was issued against his lands and goods, in the month of December, 1817, by virtue whereof his Majesty's *Attorney-General*, on behalf of his Majesty, claimed to be entitled to the monies to be produced by the freehold and leasehold estates of John Philpott, after satisfying what should be due and owing to the plaintiffs and to John Upton upon the security thereof ; and that the said John Upton alleged, that there was a considerable sum of money due to him upon the security of the premises mentioned in the said bond to be in mortgage to him.

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v.  
PHILPOTT.

That it was agreed between the plaintiff John Minet Fector and the proper officers of his Majesty in that behalf, that the said freehold and leasehold estates should be sold, without prejudice to the plaintiff's claim upon, and right and interest to and in the proceeds thereof ; and the plaintiff agreed to deliver to the Solicitors for the Affairs of Taxes the said lease, and the several \*other title-deeds, evidences, and writings in his possession or power, without prejudice to his said lien as equitable mortgagee ; and the same were delivered up accordingly, and the Solicitors for the Affairs of Taxes signed a receipt for the same.

[ \*202 ]

That the said leasehold premises were accordingly sold under the said extent, in the month of July, 1818, and produced the sum of 555*l.* ; and such sum has been paid to, and is now in the hands of the Earl of Liverpool, the Constable of Dover Castle, subject to the plaintiff's claim therein.

That, in the month of September, 1818, the residue of the said lands comprized in the plaintiff's mortgage security was put up to sale by public auction, under the said extent ; and the premises comprized in the said mortgage to the said John Upton were sold for the sum of 594*l.*, being greatly more than sufficient to pay or satisfy all the principal and interest due upon the said mortgage to the said John Upton ; and that the money was paid into the bank, to the credit of the Deputy Remembrancer of this Court, and is now remaining there.

FECTOR      That other parts of the said premises mortgaged to the  
r.  
PHILPOTT. plaintiff John Minet Fector were also sold under the said extent,  
and the proceeds were in the like manner paid into the bank,  
to the credit of the Deputy Remembrancer; and other parts  
[ \*203 ] \*of the said premises were put up to sale, expressly subject  
to the plaintiff's mortgages for 1,400*l.* and interest, but the same  
were not sold.

The defendant Philpott, by his answer, admitting most of the material facts charged in the bill, denied, however, that the last-mentioned new lease was delivered to Shipdem to hold for the plaintiffs subject to the lien created with respect to the old lease; for that Shipdem, as clerk to the Commissioners for the Affairs of Taxes, had seized the premises granted thereby for satisfying a charge against him of arrears of taxes collected by him: and he alleged that although, by his accounts as collector, it might appear that he was indebted to the Crown therefore, yet in truth and in fact, he was not so indebted to the Crown, inasmuch as he had at all times, and particularly when he ceased to be collector, a sufficient sum of money to satisfy the Crown debt in the hands of Messrs. Lathom & Co., bankers, at Dover; that he had then in their hands a large sum of money, which had been collected by him for the taxes in his division, but which the said bankers (one of whom was a Commissioner for the Affairs of Taxes there) had appropriated to their private demands in account against him (Philpott).

The bill was afterwards dismissed as against the Earl of Liverpool and John Upton: and the plaintiff Fector dying during the pendency of the suit, a bill of revivor and supplement was  
[ \*204 ] \*filed by his personal representatives, praying a revivor, and an injunction against proceedings on the part of Philpott for recovering the rents of the premises.

The *Attorney-General* put in the usual formal answer.

Witnesses were examined to prove the principal facts. The most material of those was John Shipdem, who proved the execution of the bond from Philpott to the plaintiffs Fector and Minet.

He also deposed, that in the year 1815 he held the office of Registrar of Dover Harbour;—that the old lease was delivered up to him on behalf of the lessors (the Warden, &c. of Dover

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Harbour), by the plaintiff Fector, in 1815, for the purpose of a new lease being granted to him, having at that time, to the witness's knowledge, a lien thereon; that in April, 1818, the witness, as agent to the plaintiff Fector, delivered the new lease (with an assignment of the old lease, dated November, 1794, from the original lessee to Philpott,) to the Solicitors for the Affairs of Taxes, for the purpose of being exhibited to the Court of Exchequer, upon an express agreement that they should hold it without prejudice to the claim of the plaintiff Fector upon the defendant Philpott.

On these facts it was submitted, on the part of the plaintiffs, by

[ 205 ]

*Jervis* and *Roupell*, that they had an equitable lien as mortgagees, in equity, on the estates of the defendant Philpott, as against the Crown. The question of law, they submitted, had been very fully argued, and finally determined, in the reported case of *Casperd v. The Attorney-General* and others,† which, they urged, could not be distinguished from this case.

*Clarke*, for the *Attorney-General*, on the part of the Crown, on the contrary, urged that this case was distinguishable, in two very material respects, from that of *Casperd* and *The Attorney-General*, which had been relied on on the part of the plaintiffs; first, because in this case the plaintiffs, insisting on their lien in equity, had not possession of the title-deeds belonging to a part of the freehold property of Philpott then already equitably pledged to Upton, in whose custody those deeds were, having been delivered to him by Philpott for the purpose of giving him the equitable lien, according to the doctrine of the case of *Casperd v. The Attorney-General*.

Secondly, with respect to the leasehold property held under the Warden and Assistants of Dover, he contended that, as the defendant Philpott's own title to the interest which he had \*therein had accrued since the transaction on which the lien of the plaintiffs was supposed to be founded, and since the defendant Philpott had become a debtor of the Crown, (whatever

[ \*206 ]

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interest he might have had in the premises before that time having been duly and formally surrendered, whereby it passed from him to the original lessor), the lien of the Crown had attached at a time when the lien of the plaintiff was destroyed and at an end, or at least suspended; or if it had ever been renewed by the renewal of the lease, it must, under the circumstances, be considered to be postponed to that of the Crown.

*Jervis*, in reply, contended that the actual delivery of the deeds was not necessary to give an equitable lien, where they were already in possession of a prior equitable mortgagee, or that his possession would be that of every subsequent mortgagee for such purpose; and he submitted, that even in case of a legal mortgage, a second mortgagee would have only a lien in equity.

He also urged, that with respect to the renewed lease, the lien created by delivery of the original, or first lease, extended in equity to the second.

RICHARDS, C. B. :

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I am not at all disposed to delay giving judgment upon this case, because I have not the least doubt on the question; and although I should be wrong in my \*opinion, I should not, I am sure, be induced to change it after any time for deliberation which I might take to consider of it.

This is a bill filed by the plaintiffs, claiming in the character, now recognised in courts of equity, of equitable mortgagees, against the mortgagor, and against the Crown, in the person of the *Attorney-General*, setting up, on the part of the King, a claim of lien on the property, on the ground that the mortgagor was a debtor of the King at the time of the second mortgage: and that his interest in the property, which is substantially the subject-matter of this suit, was then bound, and liable to the satisfaction of the Crown debt, in preference to that of the plaintiff.

I will here observe at once that the defendant Philpott, the mortgagor of this property, appears to me to have no case at all, because he is clearly bound by his own acts.

The whole question, therefore, is between the plaintiff and the *Attorney-General*. The *Attorney-General* makes two objections to

the plaintiff's claim against the Crown, applying each of them to a different part of the property in dispute. With respect to that part of it which was the subject-matter of the new lease, the *Attorney-General*, by *Mr. Clarke*, argues that there is no equitable mortgage affecting those premises which were comprised in that renewed instrument. With respect to the other part of the \*defendant's real property, he contends that there was no equitable mortgage at all.

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The mortgage so admitted was created as long ago as the year 1811. By that mortgage it is quite clear, as it is conceded, that the leasehold premises, as well as the other premises, were put into pledge by *Mr. Philpott* to the plaintiffs, and there is no objection made to the validity of such a security. The lease, however, I take it for granted, which was delivered up to the lessor after that lease expired, before January, 1814, was kept by the plaintiff as a deposit by way of security until that time; then application was made by them for a renewal of the lease, or a new lease of the same premises; which premises, as the defendant's counsel very properly say, were the subject of the security beyond all question.

Now, the term of the lease being out, the plaintiff had still, beyond all doubt, security on the premises. The defendant *Philpott* never could have recovered this old lease without paying the money. As, therefore, there is no doubt that, if the old lease had been delivered to *Philpott* he would have a right to apply to the lessor for a new lease, the plaintiffs, standing in the place of *Philpott*, had the same right. In truth, the plaintiffs were bound, in the situation in which they stood, to apply to have the lease renewed, or to have a new lease made to them of the premises; for, taking it as a deposit of deeds, they \*make themselves trustees of *Philpott*, subject to their own debt, which was secured on the property. They accordingly obtain a new lease of the same premises. Now, I take it to be as clear a proposition as that two and two make four, that any new interests in the premises that are conveyed are subject to precisely the same equities with which they were clothed in the hands of the equitable mortgagee, in whose hands the deeds relating to them were deposited as a security. That being so, it appears *primâ facie*, to be also clear, that the new lease must be as much a

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[ \*210 ]

security as the old lease was on the engagement of Philpott. But then it is said, they took the new lease in the name of Philpott. The defendant's counsel have given the fair answer to that; which is, that he was the only person in whose name the lease could be made, as the premises were his property. It is said, they took the premises on new terms; (and, it must be admitted, as it is for the purpose of argument,) that they took it on terms which were not so favourable as those of the old lease: but that does not alter the case as to the question of the lien; nor would it make any difference, in my opinion, whether Philpott consented or not to the new terms. At all events, the plaintiffs, as to a certain extent trustees of Philpott, were bound to get the renewal of the lease. If they made a worse bargain than they might have made with due diligence, to be sure Philpott might have had some reason to complain of them; and he might, perhaps, have recovered \*damages against them in an action at law; but still the lease being made of the same premises, and the lease being the only security the mortgagees had, beyond all question the old and new lease were precisely in the same situation, as pledged to the plaintiffs for their debt; and Philpott was as much bound by the delivery of the new lease by the officer, as he originally had been by the delivery of the original lease by himself. It is said, the lease was not delivered to Mr. Shipden for the purpose stated in the bill; but he himself says, he was employed to deliver up the old lease, in order to procure a new lease to be granted for the benefit of the plaintiffs; and that he received it from the lessor, and kept it as a deposit for the security of the plaintiffs, who had delivered to him the former lease, which was their security, in order to have a better and a more substantial, or rather a more valuable security for the money which was then still due to them.

Under these circumstances, I confess it does seem to me to be perfectly clear that the plaintiffs are entitled to be considered as having an equitable mortgage on the tenements mentioned in the lease.

Then, with respect to the other premises the counsel for the Crown insist that there is no equitable mortgage in the case, because they were already mortgaged to Upton by the delivery

of the deeds to him for that purpose; and, consequently \*(it was urged), there could be no further mortgage created as to those premises, because the deeds could not again be delivered. But are we now to learn, that there is no mode of creating an equitable mortgage except by the actual delivery of title-deeds? In the common case of a second mortgage of property agreed to be made on the satisfaction of the prior mortgage, is not that an equitable mortgage? Most assuredly it is; for, as the counsel for the plaintiffs say, if premises have been once legally conveyed to a first mortgagee, subsequent incumbrancers must be necessarily equitable, and no more. Now here there is a direct engagement in the bond executed by Philpott, that he will convey the estates, subject to Upton's mortgage to the plaintiff, in trust to sell in the first place; and, in the mean time, they are to be considered as pledged. If it were only a trust in order to pay them, is not that such an engagement as will create an equitable security? There is, in fact, an actual engagement that the premises mortgaged shall be a security for the subsequent debt to the plaintiffs.

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I am consequently of opinion that there is, on the part of Mr. Philpott, a security created with respect to the leasehold premises, not only which he possessed in virtue of the old lease, but also under the lease which was given by him in 1814: and that there is also a further equitable security created with respect to the premises previously pledged to Upton.

Then, it being admitted, that—if it be, in point of law, an equitable security, and if it was created, in point of fact, prior to the accrual of the right of the Crown in regard of time, it is an equitable security available against the Crown: and it being clear that Philpott did not become indebted to the Crown until 1815, several years after the equitable mortgage was created, it does, under these circumstances, seem to me that a decree, as a matter almost of course, should be made in the terms of the prayer of the bill.

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*Account decreed: and the plaintiffs to be paid the amount due to them on their lien out of the funds in Court arising from the sale of the property; but without personal costs.*

## IN THE HOUSE OF LORDS.

1823.  
*June 6.*  
 [ 213 ]

BETWEEN SIR RALPH NOEL AND OTHERS (Defendants in the Court of Exchequer), APPELLANTS; and THE REV. THOMAS NOEL AND OTHERS (Plaintiffs in the Court of Exchequer) and MORTON LORD HENLEY AND OTHERS (Defendants in the Court of Exchequer), RESPONDENTS.

(12 Price, 213—334).

Circumstances manifesting indication of intention in a will to exonerate personalty from debts.

A sum of money directed by a will to be raised out of a certain fund in a contingency which fails, sinks into and accrues to the persons entitled to the residue of that fund.

[ 214 ] THE appellants, Lady Noel, Nathaniel Curzon, and Lady  
 Tamworth, were the next of kin of Thomas Lord Viscount  
 [ \*215 ] Wentworth, deceased, \*whose will is presently stated: and as  
 such next of kin, claimed to be entitled to the testator's residuary  
 personal estate, in consequence of the residuary legatee under  
 the will (the testator's wife, Lady Wentworth) having died in the  
 [ \*216 ] testator's \*life-time. The appellants Lady Noel and Nathaniel  
 Curzon, were also the testator's co-heirs at law. The appellants  
 Sir Ralph Noel (formerly Sir Ralph Milbanke) and Lord Tam-  
 [ \*217 ] worth were the husbands of the appellants Lady \*Noel and Lady  
 Tamworth, claiming in right of their respective wives.

The respondents Lord Henley and Sir James Bland Burges were the sole surviving executors under the said testator's will. They were also, under the will, the trustees for sale of certain real estates thereby devised to them upon trust to sell, and out of the monies arising from such sale to pay certain sums the will expressly directed to be paid thereout; and, amongst those sums, a mortgage debt of 20,000*l.* and interest to Lady Robert Manners, and a sum of 5,000*l.* to the testator's said late wife, in part satisfaction of a sum of 10,000*l.* stated in the will to be secured to her by the marriage settlement therein mentioned, in case of her surviving the testator, and failure of issue of his body by her; and, after those payments, to lay out and invest

the residue of the monies arising from the sale, and to stand possessed thereof upon certain trusts in the will in that behalf expressed. The other respondents were all of them (most of them beneficially, and the rest as trustees) entitled to that residue under the trusts so expressed.

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The respondents insisted that the mortgage debt of 20,000*l.* to Lady Robert Manners ought to be paid out of the testator's personal estate:—and that the 5,000*l.* directed to be paid to the testator's wife ought not to be raised at all.

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The appellants, on the other hand, contended that the mortgage debt to Lady Robert Manners ought to be paid out of the monies arising from the sale of the said real estates, and not out of the testator's personal estate: and that, with respect to the 5,000*l.* directed to be paid to the testator's wife, there was a resulting trust of that for the testator's co-heirs, in consequence of the death of the testator's wife in his life-time.

By the will, which was dated the 8th of June, 1805, and properly executed and attested to pass real estates, the testator in the first place devised all his real estates in the counties of Leicester and Warwick, and to which, under the settlement made previous to his marriage with his wife, Mary Dowager Countess Ligonier, he was entitled in fee simple, in reversion expectant on the limitations therein contained, to his sons successively in tail male, subject to the terms of years and charges thereby created, and to the mortgages or incumbrances therein mentioned or recited; and also all other his real estates, whatsoever and wheresoever, of or to which he was seised or entitled for an estate of freehold and inheritance, or of freehold only, in possession, reversion, remainder, or expectancy, or which in virtue of any special power, he was enabled or authorized to dispose of (*excepting* those to which he was entitled under the marriage-settlement or will of his late great uncle, Thomas Rowney, Esq. deceased, or as his heir at law, in the several counties of Gloucester, Worcester, Warwick, Northumberland, Durham, York, Middlesex, and Surrey, and the City of London, or elsewhere; and also except certain estates which were vested in the said testator upon any trust, or by way of mortgage,) to the respondents Morton Lord Henley and Sir James Bland Burges,

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and their heirs, upon the several uses and trusts, and to and for the several intents and purposes in the said will in that behalf mentioned. He then, after reciting that he was \*possessed of the manor of Desford, in the county of Leicester for a term of years, by a lease from the King in his capacity of Duke of Lancaster, thereby gave the same, and all and singular other the leasehold premises, unto the said Morton Lord Henley and Sir James Bland Burges, upon and for such trusts and purposes as (regard being had to the nature and quality of the same premises respectively) would best, or nearest correspond with the uses and trusts therein-before expressed concerning the freehold estates therein-before devised. He then, after mentioning that the real estates devised by the will of the said Thomas Rowney stood limited and settled to the use of himself for life, and, after his decease, to his sons successively in tail male, and, for default of such issue, to his right heirs; and that under the trusts contained in the said will of the said Thomas Rowney, the surplus or residue of the said Thomas Rowney's estate, consisting at the date of the now-reciting will, of 756*l.* 9*s.* 5*d.* Bank 3 per cent. Consolidated Annuities, then standing in the name of Oldfield Bowles, Esq., and of a sum in some other of the public funds, then standing in the name of the Accountant General of the Court of Chancery, to be laid out in the purchase of lands and other hereditaments, to be settled to the same uses as were then subsisting, or capable of taking effect in the said estates devised by the will of the said T. Rowney, declared his mind and will to be, that the surplus and residue of the personal estate of the said T. Rowney should, from the time of his the \*said testator's decease, be considered as personal estate, and not as land; and, therefore, that the same should not be laid out in the purchase of lands or other hereditaments: and that if any lands or other hereditaments should have been purchased with the same, the lands and hereditaments so purchased should be sold. And he thereby declared his will and mind to be, that the said surplus or residue of the said personal estate of the said Thomas Rowney, and also the monies to arise from the sale of the lands and hereditaments which should or might be purchased with the same, should be considered and taken as part of his the said

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testator's personal estate; and he thereby gave and bequeathed the same unto his executors thereafter named, to be applied and disposed of in and towards payment of his debts and legacies. The will then proceeds as follows :

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"I give and devise all and every my manors, messuages, lands, tenements, rectories, advowsons, rents, and other hereditaments whatsoever situate in the several counties of Gloucester, Worcester, Warwick, Northumberland, Durham, York, Middlesex, and Surry, and the city of London, or elsewhere, which I am entitled to in fee simple, in possession, reversion, remainder, or expectancy, or which I have any power to dispose of under the marriage-settlement or will, or as the heir at law of my said late great uncle, Thomas Rowney, Esq. deceased (subject to \*an annuity of 10*l.* to Edward Clasidge for his life, and, after his death, to his wife for her life, charged on some part thereof by the will of the said Thomas Rowney,) and all my estate, right, and title of, in, and to the same premises, and every part thereof, in reversion, remainder, or expectancy, or otherwise howsoever, unto and to the use of the said Morton Lord Henley and Sir James Bland Burges, and their heirs upon trust that they the said Morton Lord Henley and Sir James Bland Burges, or the survivor of them, or the heirs of such survivor, do and shall, at such time or times after my decease as to them or him shall seem most advisable, sell and dispose of the said premises, either together or in separate parcels, and at one or several times, and either by public auction or sale, or by private contract as shall appear most advantageous, and at or for such price or prices as they or he shall approve of: and I do hereby declare that the receipt or receipts of the said Morton Lord Henley and Sir James Bland Burges, or the survivor of them, or the heirs, executors, or administrators of such survivor, shall be from time to time a sufficient and effectual discharge to the person or persons who shall purchase the same, or any part thereof, for his and their purchase-money; and it shall not be incumbent on such purchaser or purchasers to see to the application thereof, nor shall he or they be in anywise answerable for any loss, misapplication, or non-application, which may happen \*to or befall the same: and I do hereby declare my mind and will to

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be, that the said Morton Lord Henley and Sir James Bland Burges, and the survivor of them, and the heirs, executors, and administrators of such survivor, shall stand possessed of and in the monies to arise from the sale of the said premises, and the rents and profits arising therefrom in the mean time, and until such sale, upon the trusts, and to and for the several ends, intents, and purposes hereinafter mentioned: (that is to say) in trust, in the first place, to pay and discharge the principal sum of 2,000*l.* charged upon some part of the afore-mentioned premises, and raisable by means of a term of 1,000 years, created by the settlement made previous to the marriage of the said Thomas Rowney with Mary Trollope, spinster, and thereby limited to Thomas Pardoe, doctor in divinity, and John Wright, Esquire, their executors, administrators, and assigns; and which sum was directed and appointed to be paid to me by the said Mary, under a power given her by the said settlement, and has been since assigned by me to Richard Haworth, Esquire, by way of mortgage, and all interest that shall be due for or in respect of said sum of 2,000*l.*; and also to pay, retain, and discharge all the costs, charges, and expenses which shall be incurred or occasioned in the execution and performance of the said trust thereby created and reposed in them for sale of the said premises, or \*incident thereto or consequent thereupon; and, in the next place, in trust, to pay and discharge the principal sum of 20,000*l.* now due and owing, and secured to the Right Honourable Mary, the widow of the late Right Honourable Lord Robert Manners, with interest for the same, upon or by a mortgage or mortgages of certain parts of my estates in the said counties of Leicester and Warwick, hereinbefore devised by me in strict settlement as aforesaid, and all interest that shall be due at my death, or become due, upon or for the said principal sum of 20,000*l.* until actual payment thereof, and all costs, charges, and expences which shall be incurred or occasioned in the well and effectually releasing, liberating, and discharging the said mortgaged premises therefrom; and upon further trust to pay out of the monies to arise as aforesaid the sum of 5,000*l.* unto my dear wife, her executors or administrators (in part satisfaction of the sum of 10,000*l.* secured to her by the settle-

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ment made previous to my marriage with her out of certain trust funds therein mentioned, in case of her surviving me, and failure of issue of my body by her); and the sum of 3,000*l.* unto the said Thomas Noel, his executors or administrators: both which last-mentioned sums I direct to be paid as soon as sufficient monies shall have arisen by such sale or sales as aforesaid, after the other payments hereinbefore directed to be paid thereout, and that the same shall carry interest from my \*death, at the rate of 5*l.* per cent. per annum; and also to pay and discharge so much and such parts of such other of my just debts, and of the other pecuniary legacies by me hereinafter given and bequeathed, and which I shall hereafter give or bequeath, by any codicil or writing under my hand, as my personal estate not hereinafter specifically bequeathed, and the said personal estate of my said late uncle, Thomas Rowney, Esquire, shall not extend to pay and satisfy; and after the several payments aforesaid, in trust to lay out and invest the residue of the monies to arise as aforesaid in real government and parliamentary securities, at interest, in the names or name of them the said Morton Lord Henley and Sir James Bland Burges, or the survivor of them, or the executors or administrators of such survivor; and from time to time change, alter, vary, and dispose of such securities for any other or others of such sort or description as aforesaid: and I will and direct that the said Morton Lord Henley and Sir James Bland Burges, and the survivor of them, shall stand possessed of the same upon the following trusts."

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Those trusts were declared to be, as to one moiety thereof, to pay the dividends and interest of that moiety to the respondent Thomas Noel for his life, and, after his death, to pay 200*l.* a year to Catherine his wife, in case she should survive him, or any other wife he might leave, for her life; and after the death of the \*said Thomas Noel, and subject to the said 200*l.* a year, to transfer the same moiety between and among the children of the said Thomas Noel, in such manner as he might appoint; with further provision for distributing it amongst their children, if there should be no appointment. And the trusts as to the other moiety were to pay the dividends and interest to Anna

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Catharina Biscoe for her life for her sole use; and, after her death, to pay 200*l.* a year to the said Vincent Hilton Biscoe; and after the death of Anna Catherina Biscoe, and without prejudice to the said 200*l.* a year to the said Vincent Hilton Biscoe, upon trust to pay and transfer the said moiety among the children of the said Anna Catharina Biscoe, other than an eldest son, in such shares as the said Anna Catherina might appoint, with a similar provision: and with this further proviso, that in case neither the said Thomas Noel or Anna Catharina Biscoe should have any child who should live to attain a vested interest in the said trust monies, the trustees should lay out the whole of the said residue to arise by the sale aforesaid in the purchase of freehold estates, which he directed should be settled upon such uses, trusts, intents, and purposes, as were thereinbefore limited and declared in the testator's marriage settlement of and concerning the said testator's estates in the counties of Leicester and Warwick.

[ \*227 ]

He then, after giving certain specific and pecuniary legacies to his said wife and various other \*persons, and, amongst others, a legacy of 100*l.* each unto Morton Lord Henley and Sir James Bland Burges, to buy rings, as a small acknowledgment for the trouble they would have in the execution of the trusts thereby reposed in them, and directing all the legacies by him thereinbefore given to be paid in full, without any deduction for or in respect of the duty payable to Government thereon, and such of the pecuniary legacies for payment whereof no time was thereinbefore appointed, to be paid at such times as his executors in their discretion should think proper, not exceeding twelve calendar months after his decease, gave the residue of his personal estate in these words:

"And all the rest, residue, and remainder of my personal estate and effects, whatsoever and wheresoever, if any there shall be after payment of such of my debts as are not herein otherwise provided for, legacies, and funeral and testamentary expences, I give and bequeath to my said dear wife, her executors and administrators, for her and their own use." And he then by his said will appointed his said wife, and Morton Lord Henley and Sir James Bland Burges, executrix and executors.

The testator died on the 17th of April, 1815, without issue, leaving the appellants Lady Noel and Nathaniel Curzon his co-heirs at law, and the same two appellants and the appellant Lady \*Tamworth his next of kin; the appellant Lady Noel being his only surviving sister, and the appellant Nathaniel Curzon being the eldest son of the testator's sister Sophia Susannah Viscountess Scarsdale, deceased, and the appellant Lady Tamworth being the only other child of the said Lady Scarsdale. The testator's wife, Mary, died before him, in July, 1814. The respondents Morton Lord Henley and Sir James Bland Burges both proved the will.

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NOEL.

[ \*228 ]

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After the case had been argued at the Bar,†

April 25.

The LORD CHANCELLOR [ELDON] addressed the House in the following manner. We will consider of this case, and put into a train for further inquiry being made.

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In the meantime I will observe this: if a man devises, among many others estates subject to mortgages, I take the authorities to have decided that that does not necessarily, in all cases, fix the mortgages on the estates so devised. If I recollect rightly the case of *Serle v. St. Eloy*,† the reason there given for this is, that the testator can devise them otherwise than as subject to the mortgages. But he must go further if he means to devise them not subject to the mortgages as between other persons. The peculiarity in this case, as distinguishing it from *Serle v. Eloy*—whether it distinguishes it from other cases I cannot undertake to say—is, that, besides the devise of the estates subject by the effect of law to the mortgages, there is here a specific fund provided for the express purpose of the payment of them,—I mean the proceeds of those other estates devised to be sold, upon trust to pay the mortgages out of the money arising from the sale of those estates.

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It is said upon that particularity so varying this case, that this 20,000*l.* is a personal debt of the testator, and therefore to be

† It may be noted, by way of explanation of what follows, that the arguments at the Bar were in great measure directed to the effect, as bearing upon the construction of the will, of the settlement therein re-

ferred to, and of certain mortgages, none of which appear to have been produced in evidence in the proceedings of the Courts below.—R. C.

‡ 2 P. Wms. 386; Eq. Cas. Ab. 375, pl. 13.

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thrown on the personal estate, notwithstanding that provision; and that there is not to be an application of the money arising from the sale of the real estate to pay off the mortgages, unless the personal estate should be insufficient for that purpose.

[ \*290 ]

Now, there are two ways of considering that; first, the Court must be satisfied that it was his \*debt, and that he has not, by any transactions in his life-time, so circumstanced that debt as to shift the burden of it from his personal estate to a particular part of his real property, but that his personal estate is still subject to it. Another way of putting it is, to consider whether the testator has not, in his will, expressly directed that the money to arise from the sale of part of his real estate is to be applied wholly to the payment of those charges or debts, or whatever it may be proper to call them; and whether he has not created a distinction when he comes to speak of such other of his debts; thereby intimating, that, with respect to those charges, the whole is to be paid out of his personal estate; but that, with respect to the other of his debts, so much only is to be paid out of his real estate as his personal estate will not be sufficient to pay.

That brings it again to this question, whether the respondents are right in contending, on the other side, that that distinction is made only for the sake of the general residuary legatee, and whether that residuary legatee being dead before the testator, that part of the will does not, consequently, operate differently to what it would have done if she had lived.

[ \*291 ]

Another question is, whether this will is properly and simply to be construed as if there had been a charge on the estates devised, which are to be sold for the payment of the money, according to the trusts raised thereby: or whether the \*meaning of this will is or is not that the money shall be still raised; and that the money being raised, it shall, when it can be no longer applied according to the directions respecting the application of it, go in another course: in other words, whether the 5,000*l.* is not, in that case, to go to those who were entitled to take the residue.

But one very material view of the case must depend on the consideration whether this 20,000*l.* was originally his debt; and, supposing it to have been originally his debt, whether, by some transaction inter vivos, he had not shifted it from the personality,

by changing its character of a personal debt to that of a debt or charge to be paid afterwards out of the mortgaged estate; or whether he had shifted it, by the effect of such intermediate transaction, to some other real estate.

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These considerations make it necessary that we should see the settlement, and the deeds creating the mortgages.†

#### LORD REDESDALE :

The settlement having been expressly referred to in the will, I think that we should look at it, as we may do, for the purpose of obtaining such further information as it is absolutely necessary should be before the House to enable your Lordships to determine these questions.†

The following is a brief extract of the settlement of the testator on his marriage :

It was of five parts, dated 1st February, 1788, and made between Lord Wentworth, the testator, of the first part, the Dowager Countess Ligonier of the second part, Sir Willoughby Aston and Sir H. W. Dashwood of the third part, Thomas Lord Bulkeley and Ralph Milbanke, Esq. of the fourth part, and John Batt, Esq. and the Honourable Thomas F. Wenman of the fifth part. After reciting the intended marriage, and that Lord Wentworth was seised in fee simple in possession, or entitled to the equity of redemption of (&c. &c.) the Leicestershire and Warwick—or, as they are termed in the case, the Wentworth—estates, subject (&c.) as to part of them, to the principal sum of 15,000*l.* due and owing to Joseph Boulton (&c.), with interest; a mortgage, by lease and release, 9th and 10th October, 1776; and another mortgage of the following year for 5,000*l.*, and a further mortgage for 3,400*l.* in 1783, both to said J. Boulton; two annuities, of 160*l.* and 90*l.* to Lady Noel, by indenture, 3rd October, 1776; and 10,000*l.* by deed poll (1777) indorsed thereon to Sir F. Drake, and secured by indentures of lease and

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† It is to be noted that this was a very exceptional proceeding, which is hardly to be regarded as a precedent. See the observations of Lord BROUGHAM and Lord LYNCHURST in *Attwood v. Small* (1838) 6 Cl. & Fin. 232, 301, 304, and of Lord SELBORNE in *Banco de Portugal v. Waddell* (1880) 5 App. Cas. 161, 170, 49 L. J. Bank. 33, 37.—R. C.

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r.  
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release, 11th and 12th March, 1787 (all such deeds having been executed by Lord Wentworth, the testator).

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The settlement then recited, that the intended wife was possessed of 37,000*l.* 3 per cent. Consols, and a fourth part of the profits of the offices of Clerk of the Hanaper and Registrar of the Affidavits in Chancery, and a fourth part of the \*unsold estates of Lord Northington, and a leasehold house in Chesterfield-street, Hanover-square. And it recited that Lord Wentworth was, upon his marriage, to have 5,000*l.* out of his intended wife's fortune; and that (excepting the house) the residue was to be settled on his lordship and his wife, and the issue of the marriage; and that the Wentworth estates should be settled subject to the said mortgages, and an annuity of 300*l.* to Lady Mary Noel, in satisfaction of the two before-mentioned annuities; upon trust to raise money not exceeding 5,600*l.*, and, subject thereto, to the use of Lord W. for life; and to secure an annuity of 250*l.* to his wife after his death; remainder to trustees to raise 5,000*l.* by a term of 1,500 years, for portions for younger children; with the ultimate remainder, or reversion in fee, to Lord W. It was witnessed that the trustees should stand possessed of the 37,000*l.* upon trust, &c. (in strict settlement); and in case there should be no issue of the marriage at the time of the death of Lady W. in the life-time of her husband, she was to be entitled to dispose of 5,000*l.* by will, and the trustees were to assign the residue to Lord W.: but if Lady W. should survive Lord W., the trustees were to sell sufficient stock to pay her 10,000*l.* as soon as conveniently might be after his decease—to pay her the interest and dividends of the residue for her life; and, after her death, to pay over the capital of the residue to the personal representatives of Lord W. Then, after providing for the settlement of other

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minor \*parts of the fortune of the intended wife, it was witnessed, that, in consideration of the marriage and of the said sum of 5,000*l.*, Lord W. granted, bargained, sold, &c. the Wentworth estates to Lord Bulkeley and Mr. Milbanke, habendum [subject to the said mortgages for 15,000*l.*, 5,000*l.*, 3,400*l.*, and 11,000*l.*] in trust, as to part, to pay the annuity of 300*l.* to Lady Noel; and, subject thereto, to the use of Batt and Wenman, for a term of 99 years, upon trust; and as to the same premises, and all the

Wentworth estates thereby settled, to the same persons, for a term of 1,000 years, to the use of Lord W. for life; to Lord B. and R. Milbanke, in trust to preserve, &c.; Lord W. taking the rents and profits for life, and Lady W. her annuity after his decease; and, subject thereto, to Sir W. Aston and Sir H. W. Dashwood, for a term of 1,500 years, upon trust, &c.; and from and after, and subject thereto, to the testator's first and other sons in tail male successively; and, in default of issue, to Lord W. in fee. The uses of the terms were declared to be, as to the 99 years, to secure the annuity to Lady Mary Noel; the term of 1,000 years, upon trust (subject to the annuity of 300*l.* and the before-mentioned mortgages for raising the aforesaid sum of not more than 5,600*l.*) for Lord W. And as to the term of 1,500 years, to secure the annuity of 250*l.* to the testator's wife; and subject, as aforesaid, to levy and raise the 5,000*l.* for portioning younger children.

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The covenant for further assurance was made \*subject as aforesaid; and that for freedom from incumbrances contained an exception as aforesaid. There was no covenant to pay the mortgages.

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The House having permitted the parties to be further heard by counsel on the effect of the settlement;

*Shadwell* appeared for the appellants; and

*Sugden* for the respondents.

Lord REDESDALE now submitted the following reasons for the judgment of the House:

June 6.

[Having stated the nature and objects of the appeal, the names and characters of the parties on either side, and their relative situation inter se, his Lordship proceeded as follows:]

The question which comes before your Lordships arises upon the dispositions contained in the will of Lord Wentworth, and the decree which has been pronounced by the Court of Exchequer upon a suit instituted in that Court arising out of those dispositions.

My Lord Wentworth had two estates; one which may, for distinction's sake, be called the Leicestershire estate, or the

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Wentworth estate; and the other the Rowney estate. To the first \*he derived title from his father; and to the other he was entitled under a settlement, as heir-at-law of Mr. Rowney: and the disposition which he made by his will, on which this cause arises, was, in effect, to dispose of all his real estates except the Rowney estate, which he took under the settlement as heir-at-law of Mr. Rowney, or under his will, upon certain trusts, which it is not necessary to state. With respect to the Rowney estate, he disposed of that in this way: He gave it to trustees in trust to sell and convert it into money. The consequence was, that he made that estate no longer realty, but personal estate, by the conversion of it into money; and then he directed the application of that money in the manner to which I will next advert.

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The first application which he directed was, that the money to be raised by the sale of that estate should be employed in exonerating his Leicestershire estate from certain mortgages which were then subsisting upon that and his other real estate. With respect to one of those mortgages, no question is raised as to whether it is or is not to be paid out of the money to be raised by sale of the Rowney estate: but, with respect to the second of those mortgages, a mortgage of 20,000*l.* upon the Wentworth estate, it has been contended that the Rowney estate is not to be applied in the payment of that charge, in case the personal estate of my Lord Wentworth should be equal to the payment of it, or so far only as that personal estate may \*be deficient for that purpose. This is contended for on the part of the persons who claim the benefit of the disposition made of the residue of the money to arise from the sale of the Rowney estate. To the appellants, who are heirs at law and next of kin, it makes just this difference—Lady Noel and Mr. Curzon would be each entitled to one moiety of any realty in dispute, not devised, as heirs at law of Lord Wentworth; whilst they and Lady Tamworth, the sister of Mr. Curzon, would be also entitled, as the next of kin, to the personal estate of Lord Wentworth, the testator. It is principally of importance to them, therefore, claiming as heirs, or as next of kin, that this sum of 20,000*l.* should be applied in discharge of the mortgage that subsisted upon the Leicestershire estate; and if there was no right to demand payment of that

mortgage, in the first instance, out of the personal estate of Lord Wentworth, then that they should be entitled to the benefit that might arise from satisfying that demand out of the Rowney estate, and not such of the respondents as are the persons who are the claimants of the residue of the money to arise by the sale of that estate under the devise in the will.

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The decree which has been made in the Court below has been founded, in some sort, upon the notion that the 20,000*l.* was a debt attaching upon the personal estate of Lord Wentworth, as well as a charge upon his Leicestershire estate; and, therefore, it has been decreed that the personal \*estate ought, in the first instance, to be applied in payment of that debt; and that the 20,000*l.* which was directed to be raised out of the Rowney estate was not necessarily to be so applied, because the personal estate was sufficient; or at least only in so far as the personal estate might be insufficient for the payment of that charge.

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The persons, therefore, who claimed the benefit of the money to arise by sale of the Rowney estate, insisted that that mortgage should be paid out of the personal estate, so far as that personal estate would extend; and that only so much, if any, of that 20,000*l.* as might then be necessary to discharge the Leicestershire estate of the incumbrance upon it, should be demanded out of the money to be raised by the sale of the Rowney estate, for the purpose of supplying the deficiency.

Now, looking at the will of Lord Wentworth with respect to the disposition of the Rowney estate, it seems to me perfectly clear that the persons who claim the benefit of the residue of the money to arise by sale of the Rowney estate can have no claim whatever to have that sum of 20,000*l.* paid out of the personal estate; for the disposition which he makes by his will is this: He first directs the whole of the Rowney estate to be sold to be converted into money, upon trust to be applied first in payment of the charge of 2,000*l.* by way of mortgage on the \*Rowney estate, in respect of which no objection is made by either party against the application of the money in payment of that charge. He directs it to be applied not only in payment of the principal money, but of the interest, and all expences which

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should be incurred in exonerating the Rowney estate from that charge.

He then, in the same language, directs the 20,000*l.* charged by mortgage on the Leicestershire and Warwick (or Wentworth) estate to be paid in the same way; and all interest due at the time of his death, or afterwards, and all expences that should be incurred in removing that charge from the Leicestershire estate, and paying or discharging it out of the proceeds of the sale of the Rowney estate.

The testator afterwards gives various sums of money out of the same fund, to be raised by sale of the Rowney estate, to various persons; particularly the sums of 5,000*l.* and 3,000*l.*, and charges it with debts and legacies; and after those deductions, he gives the remaining part or residue of the money upon certain trusts expressed in the will.

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Now, concerning the produce of the sale of that property, one question arises on the bequest of that 5,000*l.* The persons now claiming it can claim nothing out of that fund but what is given by this will. By the will that sum of 5,000*l.* is given by way of legacy to Lady Wentworth, in \*part satisfaction of a certain demand or debt which she would have had against Lord Wentworth under her settlement, to be satisfied out of his property, if he had not made that disposition, and she had survived him. Now, if any property is given by a will, as the subject of a legacy, to a person in being at the time when the will is made, but who dies before the testator, that legacy, of course, becomes lapsed, and is no longer payable. That is, by law, the result of such contingency; to which every person who makes a disposition by will must be deemed to know that such a disposition is subject; and therefore, although it is contended, on the part of the heirs at law of Lord Wentworth, that that 5,000*l.* arising out of the sale of the Rowney estate should be raised for their benefit, as so much residue of his real estate undisposed of by Lord Wentworth's will, I conceive that that is not the true construction of the will of Lord Wentworth; because, having given that 5,000*l.* in the shape of a legacy, which, in its nature, must be subject to that species of contingency, the contingency is one which he must be supposed to have looked to for the benefit of those persons to

whom he gave the residue of the money to arise by sale of the Rowney estate. It therefore seems to me that the decree is perfectly right in the manner in which it has disposed of that question, by holding that that 5,000*l.* is not to be raised out of the money which was directed to be raised for that purpose by sale of the real estate, inasmuch as that contingency \*has happened to which the testator must be supposed to have looked at the time when he made his will.

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With respect to the 20,000*l.* it is directly the reverse. That 20,000*l.* was a debt existing upon his Leicestershire estate,—a debt which, in some manner or other, was charged upon that estate, but it was certainly subject to no contingency; and, therefore, when he directed the 20,000*l.* to be taken out of the money to be raised by the sale of the Rowney estate, he must have intended that those persons who were to take the residue of the money that arose from the Rowney estate should take that residue after payment of that sum of 20,000*l.* I think, therefore, that there is really no question properly between the persons who are devisees, not properly or expressly devisees, but who are entitled, under his will, to the surplus of the money arising from the sale of the Rowney estate, and the persons who are entitled, as his next of kin, to his personal estate. The decree has treated the 20,000*l.* as a debt affecting the personal estate of Lord Wentworth, and to be first paid thereout, upon the principle that where the personal and real estate are both chargeable with the payment of a mortgage debt, the personal estate shall be first applied, in exoneration of the real estate. This is founded upon certain rules which have been long established in the courts of equity, and which are rules for what is commonly called the marshalling of assets; that is, for applying the real and personal \*property of a person dying, whether testate or intestate, in payment of his debts, according to a certain order established by those rules. And, certainly, if a debt be a debt that is particularly charged on real estate, but is also a personal debt of the testator, or of a person dying intestate, it is perfectly clear that, according to the course of those established rules, the debt, though charged by way of mortgage on the real estate, is to be taken, in the first place, out of the personal estate, if the personal

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estate will extend to the payment of it; or if not, so far as it will extend towards that payment; and the real estate can only be resorted to to make good the deficiency, if any. But this has always been considered as a right existing on behalf of the person, whether devisee or heir at law, who may claim the real estate; and a right in that person to have the personal estate so applied, in exoneration and discharge of the real estate.

The first question that would arise, therefore, in this case, would be, whether this 20,000*l.* was, under the circumstances, to be considered as a debt against the personal estate of Lord Wentworth, as between the persons entitled to the Leicestershire or Wentworth estate, upon which it was originally charged by way of mortgage, and the persons entitled, as next of kin of Lord Wentworth, to the personal estate, or as residuary legatees of the personal estate he was possessed of at the time of his death.

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Looking at the original constitution of the debt itself, I think great doubt might be raised whether it ever was a debt upon the personal estate of Lord Wentworth,—I mean a debt which any person but a creditor had a right to demand as against the personal estate of Lord Wentworth; for a creditor may have a right to demand a debt against the personal estate, which the heir at law or devisee of the real estate may not have a right to require to be paid out of the personal estate, in exoneration of the real estate. Thus, for instance, if a real estate comes to a man subject to a mortgage, and, upon transfer of that mortgage, that person covenants for payment of the mortgage-money (which he must do in order to obtain the loan from the person who takes the mortgage), that is not a debt which is not to be paid out of his personal estate, in exoneration of his real estate, for the benefit of the heir at law, because the debt was not originally his debt. Then I think great doubt might be raised in this case, whether the 20,000*l.* charged upon the Leicestershire estate ought to be considered, at least with respect to a considerable part of it, as a debt which was originally the debt of Lord Wentworth, in the sense in which that word is commonly understood in such cases; but I think it is scarcely necessary to agitate that question, because Lord Wentworth, upon his marriage, made a settlement of the Leicestershire (or Wentworth)

estate, then subject to this mortgage ; and in that settlement he cautiously provided that the persons claiming \*the Leicestershire estate under that settlement should not have a right to call upon him for payment of that debt. Anxious words are used in that provision, the effect of which would certainly be, that no person claiming under the settlement which he made of the Leicestershire estate upon his marriage, could require him to pay out of his other property, whatever it might be, that mortgage debt ; but that the persons claiming under the settlement must take subject to that mortgage. All the limitations in that settlement, however, terminated with his death, because Lady Wentworth had already died before him, and because there was no issue of the marriage, and therefore he had full power of disposal of the Leicestershire estate ; and if he had made no disposition of it by his will, it would have descended to his heirs at law.

This was felt in the argument on the part of the respondents ; and they contended that, inasmuch as all the limitations contained in the settlement were at an end, the question was between the persons who might, if he had died intestate, claim as heirs at law of Lord Wentworth, the Leicestershire estate ; and, possibly, his devisees, if he had disposed of his Leicestershire estate, and his next of kin, or the persons who might be entitled under the settlement to his personal estate.

I confess that it strikes me that it would be very dangerous to hold that the question could \*be so framed, because the consequence would be, that it might for a century be uncertain whether the personal estate of a person standing in the same situation in which Lord Wentworth stood was or was not to be liable to the payment of such a demand ; for, if Lord Wentworth had had issue, and the issue had for a century been in possession of this Leicestershire estate, without having barred the remainder to the right heirs of Lord Wentworth, and then the right heir had been entitled to the estate at the distance of a century, the personal estate, if not dissipated, which it might be in the mean time, might be called back out of the hands of the person to whom it had come, for the purpose of answering this charge on the Leicestershire estate : I therefore think it ought to be held, that, by the terms of that settlement, Lord Went-

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worth had declared, fully and sufficiently, his intention between the persons entitled to his real and his personal estate, that the Leicestershire estate should bear the burden of that mortgage, so that that burden should not fall upon his personal estate, either in his life-time, or after his death.

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That would be sufficient to decide the question with respect to this sum of 20,000*l.*, and that it ought not to be paid in the manner in which the decree in this case has, in disposing of that question, determined that it should ; because the decree, treating this 20,000*l.* as a debt payable out of the personal estate of Lord Wentworth, in \*exoneration of his Leicestershire estate in the first place, has supposed that the consequence would be, that the 20,000*l.* directed to be paid out of the money to arise by the sale of the Rowney estate would be for the benefit of the persons claiming the residue of the money to arise by sale of that part of his real property.

Now, it appears to me, the decree is wrong on both points ; for, on the first it is wrong, inasmuch as it proceeds on the supposition that the 20,000*l.* was a personal debt of Lord Wentworth, and therefore to be charged upon the personal estate of Lord Wentworth, in exoneration of his real estate : and it was wrong in the next place—even supposing that to have been the case—in ordering that this sum of 20,000*l.* should not be taken to pay off the mortgage on the Wentworth estate, out of the money to arise by the sale of the Rowney estate, but that it ought to sink into the mass of the residue of the money to be raised by the sale of the Rowney estate, in the same manner as the 5,000*l.* directed to be raised was held to have done.

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The question, therefore, strikes me to be, really, not between the appellants in this case, and the respondents ; but, if any question did arise, it would be between two of the appellants and the third appellant ; for, if Lord Wentworth had not executed that settlement which he did execute upon his marriage ; and if the 20,000*l.* had clearly and unquestionably been the debt of \*Lord Wentworth, payable in the first place out of his personal estate, it would have been a question between his heirs at law and his personal representatives or next of kin. And, in

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that case, I still conceive that it is impossible that the persons who claim the benefit of the residue of the money to arise by sale of the Rowney estate could have any right whatever to that 20,000*l.*; but that that 20,000*l.* must result for the benefit of the heir at law of Lord Wentworth, as part of his real estate not given to the persons who claim the benefit of that provision with respect to the Rowney estate; just as in the case where a man gives out of money to arise by sale of real estate a distinct sum of money to a charity, which is made void by the statute of mortmain, that specific sum so given is held to belong to the heir at law, and not to the person who may otherwise claim the benefit of the devise of the estate upon which that charge was made. I think, however that,—though the appellants, standing in, I may say, a contradictory situation in one respect, have not argued the question between themselves, it is clear, from the circumstances attending the nature of the debt that was charged upon the Leicestershire estate, and the settlement that was made by Lord Wentworth upon his marriage,—yet, if Lord Wentworth had died intestate, the persons who would be entitled to the benefit of the Leicestershire estate, as his heirs at law, would not have had any right to claim that mortgage to be paid out of his personal estate. But, in truth, Lord Wentworth has made \*a provision, and a specific provision, for the payment of that debt, and that removes all doubt and difficulty. He has expressly directed that it shall be paid out of the money to arise by the sale of the Rowney estate. He has, in terms, declared in what manner, and by what means, and out of what fund, he meant that debt to be paid: and he has, as it seems to me, by the very terms of his will, declared that that debt should be paid wholly out of the money to arise by the sale of the Rowney estate.

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He certainly could not, by such a direction, exclude a creditor from any demand against his personal estate, or against his Leicestershire estate, as between persons who might claim under him, whether as heir at law or devisee, or in any other manner. He has declared his will upon the subject, and they who claim under it must be bound by the will. And it seems to me that, by the very context of the will, it is clear and evident that he

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meant that the 20,000*l.* should be paid out of the produce of the Rowney estate, and out of no other fund, if the produce of the Rowney estate should be sufficient for that purpose.

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It is contended, that this was intended only for the benefit of Lady Wentworth, in case she should survive him, that she might enjoy all the benefit he had given to her by his will; and, amongst others, the residue of his personal estate. That may have been in his view, but I do not see that it was exclusively in his view. He \*had this in view, that Lady Wentworth might refuse the dispositions made by his will, and insist upon the terms of his settlement, the terms of which settlement would have given her very considerable sums of money; and he therefore made provision in his will, with a view to prevent any dispute in his family upon that subject, giving her an ample compensation for whatever she might be entitled to. But he has so expressly declared his intention that the Leicestershire estate should be exonerated from this 20,000*l.*, and all interest that should have accrued upon it at the time of his death, and all costs, charges, and expences that might arise by freeing the Leicestershire estate from the burthen, and that it should be repaid out of the money to arise by sale of the Rowney estate, that I think it impossible to suppose that he had in contemplation that that debt should be paid out of any other fund, provided that specific fund should be sufficient for the purpose, under any circumstances, and in any event; but that as far as that fund should be sufficient for that purpose, that should be the only fund to be so applied. It was probably not in his contemplation at that time that it would not be sufficient for the purpose; but I apprehend the fund was not only sufficient for the purpose, but was a very much more than ample fund for satisfying every provision to which he had made it applicable.

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Under these circumstances, it appears to me that the decree ought to be affirmed, so far as \*relates to the sum of 5,000*l.* given by way of legacy to Lady Wentworth, because that sum was given as a legacy; and therefore must be supposed by the testator to be given subject to all possibilities which might happen; and, amongst others, to the death of the legatee in the life-time of the testator.

But the 20,000*l.* was given subject to no contingency: it was a debt demandable out of his Leicestershire estates,—demandable, unquestionably, by a creditor out of his personal estate also; but it was a debt which he himself had, in his life-time, anxiously provided for in his marriage-settlement; and in such manner as that the persons claiming the Leicestershire estate under that marriage-settlement should not be at liberty to demand it as against him or his personal estate.

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I therefore conceive that the decree ought to be in this respect varied; and that it ought to be declared, that that mortgage of 20,000*l.* affecting the Leicestershire estate, with all interest due at the death of Lord Wentworth, and which has since accrued, and all costs, charges, and expences attending the exoneration of the Leicestershire estate from that mortgage, should be paid out of the produce of the Rowney estate; and, with this variation, I would submit to your Lordships to affirm the rest of the decree made by the Court of Exchequer.

The LORD CHANCELLOR, at the conclusion of Lord REDESDALE'S address, observed, that he would take the liberty of addressing a few observations to their Lordships on this case on Monday next:

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The further consideration was therefore postponed till that day; when the delivery of the grounds of the judgment was resumed in the following terms by

THE LORD CHANCELLOR [ELDON] :

In this case the bill was filed to establish the will of Lord Wentworth; and the question proposed is, in what manner certain sums directed by that will to be paid should be discharged; particularly the sum of 2,000*l.*, the sum of 20,000*l.*, and the sum of 5,000*l.*: and it will be, perhaps, in your Lordships' recollection, that there was very considerable doubt as to the sum of 20,000*l.*

The will of Lord Wentworth, as stated in the papers upon your Lordships' table, gives and devises all and singular his manors, messuages, lands, tenements, rectories, advowsons, tithes, rents, and other hereditaments whatsoever, situate in the several counties of Leicester and Warwick, to which, under



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the settlement made previous to his marriage with his wife Mary, late Dowager Countess Ligonier, he was entitled in fee simple in reversion, expectant on the limitations therein contained, to his sons successively \*in tail male; subject to the terms for years and charges thereby created, and to the mortgages and incumbrances therein mentioned or recited. Now the question as to the 20,000*l.* has relation to those mortgages and incumbrances therein mentioned or recited; and therefore it had been thought proper, upon looking into the printed cases, that the marriage-settlement should have been set out; and the cause stood over in order that we might have an opportunity of seeing and considering the effect of that settlement touching what was to be done with those two estates, as this might possibly be considered as one of those cases in which our determination, after consideration, would be of great importance.

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The testator then gives all his manors, messuages, and so on, using the general words in describing the estate, [except those to which he is entitled under the marriage-settlement or will of his late great uncle, Thomas Rowney, Esquire, deceased, or as his heir at law, in the several counties of Gloucester, Worcester, Warwick, Northumberland, Durham, York, Middlesex, and Surrey, and the city of London, or elsewhere; and also except certain estates vested in him upon any trust, or by way of mortgage,] with the appurtenances thereto respectively belonging, unto his friends, the Right Honourable Morton Lord Henley and Sir James Bland Burges, and their heirs, to the uses following; (that is to say,) “to the use, intent, and purpose that they the said \*Morton Lord Henley and Sir James Bland Burges, and the survivor of them, and his heirs, shall and may, from time to time, during the natural life of my sister Judith Lady Milbanke, wife of Sir Ralph Milbanke, Baronet, have, receive, and take, by, from, and out of my said manors, messuages, lands, tenements, hereditaments, and premises herein-before devised, one annuity, clear yearly rent-charge, or annual sum of 500*l.* sterling, clear of all deductions and abatements.” There are then the usual powers of distress and entry, for the better securing the payment of that annuity. The testator then

gives several other annuities to several persons whom he there names, together with the like power of distress, and so on, to secure the payment of those annuities respectively, with remainder to the first and other sons of Lady Milbanke, with other remainders over.

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The will then contains those clauses which are generally found in wills of this description, as to taking the name and arms of the testator; and then there is this very material clause: "And whereas the real estates devised by the will of the said Thomas Rowney now stand limited and settled to the use of me and my assigns during my life, and after my decease, to my sons successively in tail male; and, for default of such issue, to my own right heirs: and, under the trusts and directions contained in the said will of the said Thomas Rowney, the surplus or residue of his personal estate, now consisting of 756*l.* 9*s.* 5*d.* 3 per cent. \*Consolidated Bank Annuities, standing in the name of Oldfield Bowles, Esquire; and of a sum or sums in some other of the public funds, standing in the name of the Accountant General of the Court of Chancery, is to be laid out in the purchase of lands and other hereditaments, to be settled to the same uses as are subsisting, or capable of taking effect, in the estate devised by the will of the said Thomas Rowney; now I do hereby declare my will and mind to be, that the surplus and residue of the personal estate of the said Thomas Rowney shall, from the time of my decease, be considered as personal estate, and not as land; and, therefore, that the same shall not be laid out in the purchase of lands or other hereditaments; and that, if any lands or other hereditaments shall have been purchased with the same, the lands and hereditaments so purchased shall be sold. And I hereby declare my will and mind to be, that the said surplus or residue of the said personal estate of the said Thomas Rowney, and also the sum or sums of money to arise from the sale of the lands or hereditaments which shall or may be purchased with the same, shall, for all intents, effects, constructions, and purposes whatsoever, be considered and taken as part of the personal estate of me, the said Thomas Viscount Wentworth. And I hereby give and bequeath the same, and assume to give and bequeath the same

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unto my executors hereinafter named, to be by them applied and disposed of in or towards payment of my debts and legacies."

Then the testator proceeds to that part of the will upon which the principal question in the case has arisen. The first clause in that part of the will is in these words: "I give and devise all and every my manors, messuages, lands, tenements, rectories, advowsons, tithes, rents, and other hereditaments whatsoever, situate in the several counties of Gloucester, Worcester, Northumberland, Durham, York, Middlesex, and Surry, and the city of London, or elsewhere, which I am entitled to in fee simple, in possession, reversion, remainder, or expectancy, or which I have any power to dispose of under the marriage settlement or will, or the heir at law of my said late great uncle Thomas Rowney, Esquire, deceased, and all my estate, right, and title of and to the same premises, and every part thereof, in reversion, remainder, or expectancy, or otherwise howsoever, unto and to the use of the said Morton Lord Henley and Sir James Bland Burges, and their heirs, upon trust that they the said Morton Lord Henley and Sir James Bland Burges, or the survivor of them, or the heirs of such survivor, do and shall, at such time or times as to them or him shall seem most adviseable, sell and dispose of the same premises."

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The will then, after the usual clause, making the receipts of the trustees a discharge to purchasers, directs that the trustees are to stand "possessed of and in the monies to arise,"—"monies," your Lordships observe, "to arise from the sale of the said premises, and the rents \*and profits arising therefrom in the mean time; and until such sale, upon the trusts, and to and for the several ends, intents, and purposes hereinafter mentioned; that is to say, in trust, in the first place, to pay and discharge the principal sum of 2,000*l.* chargeable upon some part of the aforementioned premises, and raisable by means of a term of 1,000 years, created by the settlement made previous to the marriage of the said Thomas Rowney and Mary Trollope, spinster, and thereby limited to Thomas Pardoe, Doctor of Divinity, and John Wright, Esquire, their executors, administrators, and assigns; and which sum was directed and appointed to be paid to me by the said Mary under a power given her by

the said settlement; and has been since assigned by me to Richard Haworth, Esquire, by way of mortgage; and all interest that shall be due for or in respect of the said sum of 2,000*l*." Now, with respect to that sum, it should be observed, that it was never, in any sense, such a debt of the testator as to be discharged by that part of his real estate derived from his own immediate ancestors—the Leicestershire estate, whether the will should contain any direction to pay it or not—"and also to pay, retain, and discharge all the costs, charges, and expences which shall be incurred and occasioned in the execution and performance of the said trusts hereby created and reposed in them for sale of the said premises, or incident thereto, or consequent thereupon." There is next the following direction: "And, in the next place, in \*trust to pay and discharge the principal sum of 20,000*l*. now due and owing, and secured to the Right Honourable Mary, the widow of the late Right Hon. Robert Manners, with interest for the same, upon or by a mortgage or mortgages of certain parts of my estates in the said counties of Leicester and Warwick, hereby before devised by me in strict settlement as aforesaid." It was clearly, therefore, the object and purpose of the testator to exonerate the Leicester and Warwick estates, by the application of the fund to arise from the sale of these estates. But still this fact, however manifest it may be from the tenor of the will, would not, under these words, be alone sufficient to exonerate the personal estate of the testator from the second mortgage debt—that charged upon the Wentworth estate—if that debt had been a personal debt of the testator; or, in other words, if it were a debt to which his personal estate would be liable in the first instance. The will then goes on to direct that the trustees are to pay—and be it observed, in such a manner as to shew the testator meant out of the sum raised by the sale of these estates—all interest that shall be due at his death, or which shall become due upon or for the said principal sum of 20,000*l*. until actual payment thereof; and further that they shall pay [still out of the same fund, for it is all one sentence] all costs, charges, and expences which shall be incurred or occasioned in the well and effectually releasing, liberating, and discharging the said mortgaged premises therefrom.

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Then the testator directs the money to be possessed by the trustees upon further trust to pay, still "out of the monies to arise as aforesaid, the sum of 5,000*l.* unto my said dear wife, her executors or administrators, in part satisfaction of the sum of 10,000*l.* secured to her by the settlement made previous to my marriage with her, out of certain trust funds therein mentioned, in case of her surviving me, and failure of issue of my body by her."

You will permit me here to observe, that the 20,000*l.* must be paid; but that, with respect to this 5,000*l.* it is a direction to pay a sum of money which, according as a contingency happens one way or another, would or not be payable; that sum would not be payable if the contingency did not happen; and, in that case, the will must be read as if that direction to pay the 5,000*l.* was not in it.

Then he proceeds to give 3,000*l.* to Sir Thomas Noel. As to that legacy no question is now made. Both those last-mentioned sums he directs to be paid as soon as sufficient monies shall have arisen by such sale or sales as aforesaid, after the other payments therein-before directed to be made thereout; and that the same shall carry interest from his death, at the rate of 5*l.* per cent. per annum.

[ \*319 ]: The will then contains the following material direction, as a further trust: "And also to pay and \*discharge so much and such part of such other of my just debts, and of the other pecuniary legacies by me hereinafter given and bequeathed, or which I shall hereafter give or bequeath by any codicil or writing under my hand, as my personal estate not hereinafter specifically bequeathed, and the said personal estate of my said late uncle Thomas Rowney, Esquire, shall not extend to pay and satisfy."

So that your Lordships observe, this very important distinction is made by the testator, with respect to the 2,000*l.*, the 20,000*l.*, the 5,000*l.*, and the 3,000*l.*: he directs them all to be paid out of the monies arising out of the sale of these estates; but as to his other debts, he directs those other debts, and legacies thereinafter given, and legacies, to be paid out of the money arising from the sale of these estates, in case his personal estate shall

not be sufficient to satisfy such other debts and legacies; thus making a distinction as to the two separate funds out of which either payment is to be made—as to these four sums, pointing only to the fund arising from the real estates as to the one class of debts and legacies; and as to the other, pointing to the real estates, only if the personal should not be sufficient to pay them.

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Then follow these words: “and after the several payments aforesaid, in trust to lay out and invest the residue of the monies to arise as aforesaid in real government and parliamentary securities, at interest, in the names of his trustees; \*upon trust, as to one moiety thereof, to pay the dividends, interest, and proceeds thereof to respondent Thomas Noel for his life; and, after his death, to pay 200*l.* per annum to Catherine his wife (one of the respondents); and, subject thereto, to transfer that moiety to the children of Thomas Noel. Then follow a great many directions as to the manner in which the interests of the children are to be taken care of. And as to the other moiety, he directs the trustees to pay the dividends and interest to Mrs. Biscoe; and then it is to the children of Mr. and Mrs. Biscoe. He then, having thus far concocted a disposition of his real estate out and out, if I may use that expression, directs that what is to be paid out of it, both with respect to the same four sums he particularly mentions, and those sums which he directs to be discharged out of some money intended to be provided out of the personal fund; and then he makes this provision: “that in case neither Mr. Noel nor Mrs. Biscoe should have any child who should live to attain a vested interest in the said trust monies, then upon trust to lay out the same in the purchase of freehold estates as near to the Noel estates as conveniently may be, which shall be settled to the same uses as the Warwick and Leicester estates.”

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With respect to his personal estate, he gave his wife so many of his books and prints as she should choose; and the remainder, and all his family pictures, to his trustees, as heir looms. He also gives to his wife absolutely all his household \*goods and furniture in London, and the use for life of all his household goods and furniture at Kirby; and, after her decease, to his executors, in

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trust for Lady Noel absolutely. He also gives his wife 2,000*l.* for the expences of his funeral; and he directs, likewise, that the provisions thereby made for his said wife shall be taken and accepted by her in lieu, recompence, and satisfaction of the said principal sum of 10,000*l.* directed by her marriage-settlement to be raised and paid to her out of the trust monies therein mentioned, upon his decease, in case of her surviving him, and failure of issue of his body by her; and also, of her interest for life in the principal sums of 3,000*l.* and 11,000*l.* (other part of the said trust monies) which the said trustees had advanced on mortgage of certain parts of estates in the county of Leicester therein-before devised by him in manner aforesaid. Finally, after giving various legacies, there is this bequest: "And all the rest, residue, and remainder of my personal estate and effects, whatsoever and wheresoever, if any there shall be"—in the former part of the will, where he had supposed that the personal estate might not be entirely sufficient to pay the other debts, he had directed them to be paid out of the Noel estate, and then the Wentworth estates; now he takes up the doubt whether there would be personal estate enough for paying such of his debts as were not therein otherwise provided for; so that it is quite clear that, whether he considered some of these sums as being his debts in the sense in which we use that word in a court of equity, \*or not his debts, in that sense, yet, I say, it is perfectly clear, he did conceive that some of these sums, even if you consider them all as his debts, were not sums to be paid out of the personal estate; because, in this residuary clause, he gives the personal estate, if any there should be, "after payment of those debts not herein otherwise provided for"—therefore he does not mean to appropriate his personal estate to those otherwise provided for—"legacies and testamentary expences, I give and bequeath to my said dear wife," &c.—absolutely.

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The bill was filed, in this case, by the persons entitled to the monies arising from the sale of these estates, praying that the will might be established, and the trusts carried into execution; and they contended, that, as the wife of Lord Wentworth happened to die in his life-time, his personal estate was applic-

able to the payment of all these debts. It is remarkable that, in what is stated in the cases, the question as to the 2,000*l.* is not raised; however, it arises out of the deeds, and may be therefore taken notice of by this House.

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The Court was of opinion, first, that the 5,000*l.* was not payable at all, and therefore not to be raised; and, secondly, that the 20,000*l.* was to be paid out of the testator's personal estate.

The principal question before the House is, whether the 20,000*l.* was to be paid out of the personal estate.

Upon the general rules of law, there can be no difficulty in stating, that if a man makes a mortgage in the ordinary terms in which mortgages are usually made, he makes the mortgaged estate merely a pledge for the debt; and I will apply the few words which I have to state upon that part of the case to the ordinary and common case of a mortgage. A man's personal estate would be first applicable to the payment of his mortgage debt, in ease of his real estate; and, if he were even by his will simply to devise his mortgaged estate, without saying more, a court of equity has said, he could not give it otherwise than subject to the mortgage; and, therefore, his saying "subject to the mortgage," shall make no difference as to the application of the personal in ease of the estate. That may be considered as perfectly settled.

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If a grandfather make a mortgage, and the estate comes afterwards to the son of the grandfather for life, with remainder to the first and other sons of the father in tail, and the mortgagee calls in his money, in which case there must be a transfer of the mortgage, although the father must join in the transfer of that mortgage, and would be called upon, in all probability, to covenant for payment of the money, yet, as between the real estate and his personalty, as the charge upon the real estate was not originally his own debt, the Court would consider his personal covenant only as a collateral security, and it would not make his personalty first applicable to \*the payment of the mortgage. Lord THURLOW has said, very generally, that although a mortgage be with interest at 4 per cent., yet if, upon the transfer, it be raised to 5 per cent., the additional 1 per cent. is not a charge upon the personalty.

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It may also be stated to your Lordships, that the mere bequest of a personal estate to a legatee will not exempt that personal estate so bequeathed from its liability to exonerate the real estate in a case where, if the party had died intestate, the personal estate would be liable. It would seem, therefore, to follow as of course, that, in order to exonerate the personal estate, it must have been clear upon the face of the will that the personal estate was not meant to be so applied, but to be given to another exempted from such application: and if the gift to that other person should fail, then the personal estate would not be given at all. And there are cases which say, where a gift of personal estate fails, it being thereby consequently undisposed of, it shall be so applied as if it had not been given: but all those cases must be looked at according to their circumstances. Whatever opinion others may hold upon these subjects, I must say, having called upon your Lordships to look into the marriage settlement referred to by this will, because the obligations as to Lord Wentworth's personal and real estate arise out of that marriage settlement, I have no difficulty in the least in saying, that if all the deeds which were executed in this family for the purpose of the arrangements made \*with a view to the settlement had been read, we should never have heard of this case. I find, upon looking into that settlement, that the father of Lord Wentworth had charged his estates with portions of 8,000*l.* for his younger children; and afterwards gave to his younger children, there being three, 5,000*l.* each; and these Warwick estates became the property of Lord Wentworth subject to those charges; and, I apprehend, if nothing had been done by him—if no devise had been made, but he had died leaving the real estate to descend, subject to those charges, to others after him, as it had descended to him at the death of his father, this must have been considered as a debt of the estate, not a debt of the late lord, except in so far as he might have possessed personal estate in respect of which he might have been liable, not having accounted for it. He afterwards raises money, and makes instruments, appearing, upon the face of them, to be ordinary common mortgages, for the payment of the money which he had raised, in order to enable him to pay off those charges. After that had been done

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he married the late Lady Wentworth ; and, upon the eve of that marriage, a settlement was made, which I now have in my hand, That settlement notices the incumbrances that the estates were subject to under those mortgages, and then it goes on to settle the estates in this way. After providing what is to be done with the money which that lady brought into the family, those estates in Leicestershire and Warwick are settled first on himself for life, \*subject to these mortgages. They are so settled upon him after a provision for pin-money, and a further provision for her in case she survived him. They are then settled upon the first and other sons of the marriage, subject to those mortgages ; and the final use is to his right heirs. Then (his Leicestershire and Warwickshire estates being thus settled, and the different branches of the family who should succeed him in all of them being pointed out, the words “ taking subject to the mortgages ” being expressly repeated in the creation of every use and limitation which is to be found in this settlement from the beginning to the end,) he makes his will. In making his will, it appears that, conceiving that it would be an advantage to the family to exonerate the estates in Leicestershire and Warwickshire, he directs those other estates, by the appellation which has been mentioned to your Lordships in stating the case, of the Rowney estates, to be sold. Out of the money arising by the sale, first, the mortgage of 2,000*l.*, which was not a mortgage of his own, is to be paid to Haworth. He then directs the sum of 5,000*l.* to be paid, which was payable only on a contingency ; and that not having happened, as no further direction is given, the will has failed with reference to that part of it. He then directs the sum of 20,000*l.* to be raised out of the estates which he had devised to trustees to be sold, and the produce applied in payment of those mortgages which so affected, as I have stated to your Lordships, the Leicestershire and Warwickshire estates. After all those payments \*had been made, and after his other debts and legacies *thereinafter* given, or to be at any future time given, had been paid, so far as his personal estate, and the Rowney personal estate, would extend to pay them, he directs “ the residue of the monies to arise as *aforesaid* ”—that is, the monies to arise by the sale of the Rowney real estate, and the surplus of the Rowney personal estate, and

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what should arise from the sale of such part of the latter as might have been reconverted into land (under a direction in the will or settlement of Mr. Rowney, probably that some portion of it should be so converted into land,) to be invested in the funds upon trust to be paid in moieties to those persons who are to take that money in virtue of the testamentary words “the residue of the monies to arise as aforesaid.”

The first question presented by this part of the will is as to the fund for paying this 20,000*l*. It will occur to some of those who hear me, that it struck me very early in the argument, that, in order to construe the will, which refers over and over again to the marriage-settlement, we must see what the effect of that deed was upon this fund, upon the application of which the present question has arisen. Now that we have seen it, I will put this question—Lord Wentworth has died without leaving any issue who could take under the limitations of that settlement; but he might have left a second, third, fourth, fifth, or any number of the numerous sons usually mentioned in settlements. Supposing [ \*328 ] he had had ten \*sons; could they have been said to be entitled to take the estate as purchasers under the marriage settlement, exonerated from this charge, or to take more than an interest subject to all these mortgages, when all the covenants for title throughout except them expressly?

It was said that he afterwards gave the personal fund to other uses, but as that was for the benefit of the person to whom it was bequeathed, it makes no difference as to the equities which now arise between the different persons claiming this property, and to be determined by the joint effect of his marriage settlement and his will. The will having joined them together, we must, in deciding this case, look at the combined effect of the will and the settlement, in order to determine whether this 20,000*l*. is a charge which falls within the application of those rules of Equity by which it has been established that, in certain cases, the personal estate shall be applied towards the discharge of an incumbrance upon the real estate. I see, in both the reports of this case, the LORD CHIEF BARON treats it as the personal debt of Lord Wentworth. That, in one sense, it was his personal debt, no man can deny. When he mortgaged the estate, and by his covenant

entered into a new contract for the payment of the money, it was his debt as between him and his creditors ; but whether it was his debt as between his respective representatives is quite a different question. To determine it to be his debt as to the creditors, determines nothing in \*the very many cases that may be put whether it is his debt as between the persons claiming under him. Without troubling your Lordships further, I will only observe that, as far as I can judge from the information furnished by these cases, the operation and effect of the marriage-settlement was, unfortunately, not brought before the Lord Chief Baron in the Exchequer Chamber. That being the very instrument upon which the whole question seems to me to hinge, and not having been under his consideration when his judgment was given upon the case, I must, therefore, take the liberty of saying, that, although the decision of my LORD CHIEF BARON, who decided without the other Judges, might be very right upon the case as it was brought before him ; yet your Lordships may not be able to confirm it, having other information before you than that upon which it was determined.

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Upon these grounds, without entering into the various cases that have been cited, I must say that it does appear to me that the 20,000*l.* is a sum which must be raised out of the estates directed by the will to be sold ; and that the proceeds of the sale must be first applied, as this testator meant they should, in exoneration of the mortgages upon the Leicestershire and Warwick estates. This case has been already well stated by a noble and learned Lord now in the House ; I therefore think, for the reasons that have been given by him, if not for those given by me, that in this respect the judgment \*must be set right. The judgment of the House has been delivered in point of form, and I will move to-morrow that it be read.

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At the conclusion of the address of the LORD CHANCELLOR, Lord REDESDALE expressed himself as follows :

I cannot forbear, in this case, observing upon the embarrassment that has been cast upon this House from the case not being properly opened in the Court below. In this cause your Lordships might not have had any appeal before you, if the

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case had been properly opened in the Court of Exchequer ; and certainly not in this form ; because the present respondents in this case are, according to the opinion I have formed on the will of Lord Wentworth, not entitled to raise this question. If there could be a question, it would be between the heirs at law and the next of kin of Lord Wentworth. They are, however, joined together as appellants, when the matter really is between themselves as the heirs at law and the next of kin of Lord Wentworth. It was attempted, at the close of the second argument, which was made necessary in consequence of the case not having been brought properly before the Chief Baron, your Lordships having required to see the settlement, to shew that it did not affect the question ; but all that could be said \*on behalf of the respondents was, that as to the ultimate limitation of the Leicestershire estates to the heirs at law,—if it had descended to the heirs, they had an equity to have the personal estate applied in discharge of the mortgage ; that is, upon the supposition that it was a debt of Lord Wentworth. Now that demonstrates to me, that it is impossible the case should have been properly presented to the Court below ; because you never could have had brought together the heirs at law and next of kin, as joint appellants in this appeal, if the case had been so opened that the distinct interests of the heirs at law and next of kin had been understood in the Exchequer. It is constantly a source of considerable embarrassment to this House that cases in the Courts below have not been so opened as to bring before the Court the whole that ought to have been presented to them ; consequently, when it has been brought before this House, your Lordships have, upon more occasions than one, been compelled to have a second hearing, as you have had in this case, for the purpose of arguing a particular question, solely because it had not occurred to the parties to be prepared in the Court below, or upon the first hearing of the appeal. The same thing has happened in another case, where, I understand, there is a petition for the matter to be re-heard—that is the case of my Lord Jersey. It occasions a great deal of delay in the decision of cases in this House, that that which is brought before the House in the form of

appeal, or writ of error, comes before the House \*solely because the case has not been properly opened in the inferior Court. I mention this for this reason,—that I hear much of the delay of the administration of justice in this House, whereas the fault arises elsewhere; and principally, I think, because there is not that attention paid in the transaction of business, in the first instance, which ought to be paid to it. It does not attach to the Courts below, but to those who bring questions before them, in not laying the case properly before the Court. I thought it right to say thus much in vindication of the administration of justice in this House, which I do think of late has been most scandalously slandered.

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The House of Lords thereupon made the following

ORDER :

That the Decree, so far as it is declared that the principal sum of 20,000*l.*, the mortgage debt directed by the testator's will to be paid to Lady Robert Manners, and all interest thereon accrued due previously or subsequently to the death of the said testator, should be paid out of the testator's personal estate not specifically devised; and if the same should prove insufficient for that purpose, then that the deficiency ought to be made good out of the principal monies produced by sale of the testator's devised \*real estates, be *reversed* : and it is declared, that the said mortgage debt of 20,000*l.*, and all interest thereon which was due at the death of the said testator, and which thereafter became due, and should become due until actual payment thereof; and all costs, charges, and expenses which have been or shall be incurred or occasioned in the well and effectually releasing, liberating, and discharging therefrom the estates comprised in the said mortgage, ought to be paid out of the money produced, or to be produced, by sale of the estates devised by the said testator, upon

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trust to sell for the purposes expressed in the will, after payment of the several sums of money directed thereby to be paid out of the money to be raised by such sale, before payment of the said sum of 20,000*l.* and interest.

And it was further ordered, that, in case the money arisen, or to arise, by sale of such estates, shall not be sufficient for such purposes, then the consideration be reserved in what manner the deficiency ought to be raised and paid.

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And it was further ordered and adjudged, \*that the said Decree or Order, so far as the same declares that the sum of 5,000*l.* given by the said will to the said testator's late wife, Lady Wentworth, in part satisfaction of the sum of 10,000*l.* mentioned in the said will, ought not to be raised and paid out of the money raised, or to be raised, by sale of the estates devised by the said will, in trust to sell as aforesaid, should be *affirmed*.

And it was further declared, that the said sum of 5,000*l.* not having become payable to the said Lady Wentworth, in consequence of her death in the life-time of the said testator, the money raised, and to be raised, by sale of such estates, ought to be considered as discharged from any demand in respect thereof.

And, with these variations in the said Decree or Order, it was ordered, that the cause be referred back to the Court of Exchequer, to do therein as shall be just.

THE ATTORNEY-GENERAL *v.* GOLDER, PROSECUTED  
BY THE NAME OF GOULDER OTHERWISE GOULDEN.

(12 Price, 335—340.)

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June 3, 12.

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A seaman,—who had been taken from on board a fishing lugger at sea, by the crew of a Revenue cutter, and landed, and delivered into civil custody, without legal warrant or authority; and who was, whilst in such custody, charged with a *capias* on an information for smuggling, under which he was removed to Newgate by *habeas corpus*, at the instance of the Crown, and committed thence to the Fleet by this Court—ordered by the Court to be discharged unconditionally, on motion.

The delay which had occurred in making the application held to be no objection to a motion of this nature in such a case.

UPON motion made by *Platt*, on the part of the defendant, founded on an affidavit of the facts, which are shortly stated below, the Court granted a rule that the *Attorney-General* should shew cause why the defendant should not be discharged out of the custody of the Warden of the Fleet.

On the 27th day of April, 1822, the defendant, with five other persons, were on board a fishing lugger, at sea off Whitby, in the county of York, when the lugger was boarded by the crew of his Majesty's Revenue cruiser *Stag*, who detained the lugger, and the defendant and the other men, until the evening of Sunday, the 28th of April, when the lugger, with the defendant and the five other persons, were sent in custody by sea to Grimsby, in the county of Lincoln; off which place they arrived on the morning of Tuesday, the 30th of April, where they were detained in custody until the evening of that day. The lugger was then restored, and the defendant detained in custody, without any legal warrant or authority whatsoever, on board the *Stag*, until Friday, the 3rd of May, when he was taken out of the cruiser, handcuffed, and conveyed to Lincoln Castle, under a writ of *\*capias*, addressed to the Sheriff of Lincoln, tested the 1st of May, and issued on an information against him for forfeitures amounting to upwards of 60,000*l.*, endorsed "Bail for 1,507*l.*;" by virtue of which he was detained in custody at Lincoln until the 28th of November last.

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He was then removed to London by writ of *habeas corpus*, at the instance of his Majesty's *Attorney-General*, and confined in



ATT.-GEN. Newgate nearly three weeks, and then conveyed before one of  
T. the Barons of this Court, and committed to the custody of the  
GOLDER. Warden of the Fleet, where he had ever since remained.

The affidavit also stated, that the defendant had been detained on board the Revenue cruizer from the 27th of April until the 3rd of May, in order to give time to send to London for the writ of *capias* upon which he was sent to Lincoln Castle on the 3rd day of May aforesaid; and that up to that day, from the 27th of April, there was no legal ground of detainer whatever against the defendant: that the several causes of detainer mentioned in the copy of causes annexed to his affidavit, were in one and the same prosecution, for some offence alleged to have been committed by the defendant in the month of August, 1820.

[ \*337 ] The defendant also stated in his affidavit, that, from his arrest on the 3rd of May until the time of the present application, he had been in \*prison, and without the pecuniary means of applying to this Court on the subject of his illegal detention; which was the reason of his not applying to be discharged at an earlier period.

Under these circumstances, it was urged that the original taking of the defendant, and the subsequent detention of him in custody, being without warrant or authority, and altogether illegal, the regular process which had been sued out in the mean time, whilst he was illegally imprisoned, and was, in fact, the only pretext for his detainer, could not have been considered to have been fairly and properly executed; and therefore the defendant was entitled to be discharged by summary interference of this Court for that purpose.

*Clarke* now shewed cause:

He contended, that whatever might have been the circumstances under which the defendant had been at first detained, he was subsequently, and at present, properly in custody, on an important charge of fraud upon the revenue to a considerable amount, under a regular process, duly issued from this Court; from which, he insisted, he could not be discharged upon a motion of this sort, supported merely by his own affidavit.

He also urged, that the case, on the defendant's part, was

rendered much more suspicious by the very great delay which he had suffered to take place before he thought proper to make the \*application for his discharge, the grounds of which, if it had been made earlier, might probably have been met and answered by satisfactory reasons for the first arrest and subsequent detainer.

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In support of the rule, it was submitted that the original caption being without warrant or authority, and therefore illegal, no subsequent process could cure the illegality of that proceeding, or justify a detainer under it, even by consent; for that, in all such cases, the party was entitled to his discharge, and there must be a fresh caption to found a legal custody. In this case the defendant having been committed to the Fleet [as well as] to Newgate by *habeas corpus cum causis detentionis*, if these were illegal, the commitment and custody were void, and the defendant could not be detained.

He cited the case of *Lyford v. Tyrrel*† as an authority for the proposition that an illegal detention would vitiate and vacate an arrest made during that detention under legal process, even although the defendant should afterwards consent to the custody, on conditions acceded to by him.

He also cited *Barlow v. Hall*,‡ *Loveridge v. Plaistow*,§ *Birch* and another v. *Prodger* and another (bail, &c.),|| \**Hall v. Roche*,¶ *Spence v. Stuart*.†† And he referred the Court to the recent cases wherein they had ordered discharges under very similar circumstances: *Attorney-General v. Dorkings*,‡‡ and *Attorney-General v. Carl Cass*.§§

[ \*339 ]

*Clarke*, in reply (availing himself of the privilege of the counsel for the Crown in such matters in this Court), endeavoured to distinguish the present case from those which had been cited. In this instance, he submitted, the original arrest was not void, as in the case of an arrest on a Sunday, but merely voidable.

He also repeated the objection of the delay, urging the rule, that, where process is sought to be set aside, it is incumbent on

† 3 R. R. 553 (1 Anstr. 85).

‡ 2 Anstr. 461.

§ 2 H. Bl. 29.

|| 1 Bos. & P. (N. R.) 135.

¶ 8 T. R. 187.

†† 6 R. R. 549 (3 East, 89).

‡‡ 11 Price, 156.

§§ 11 Price, 345.

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the party to come immediately to the Court to complain of the proceeding.

On that point the Court expressed themselves of opinion that, in a case of this sort, where the complaint respected an invasion of the liberty of the subject, the objection was not applicable.

[ \*340 ]

GRAHAM and HULLOCK, Barons, were disposed to make the order for the defendant's discharge, considering that the present case could not be distinguished, in principle, from that of *Lyford v. Tyrrel*; but the CHIEF BARON entertaining \*doubt on the propriety of granting the application, on the distinction that in this case the arrest was not void, and having an opinion that the whole matter of the present complaint was subjected by the statutes, in such cases, to the discretion of the Court, the matter was therefore ordered to stand over till a future day.

June 12.  
—

And now the Court, having in the mean time determined that the defendant was entitled to be discharged, made the

*Rule absolute.*

\* \* \* No distinction was attempted to be made on the ground of the difference in the Crown process and the ordinary proceedings of subject plaintiffs, in this or the other cases in this Court, cited *supra*.

## IN THE HOUSE OF LORDS.

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 APPEAL FROM THE COURT OF CHANCERY.

 THOMAS JONES WILKINSON *v.* JAMES ADAM  
 AND OTHERS.

(12 Price, 470—501.)

 1823.  
*June 11.*  


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 [ 470 ]

[THE decretal order of Lord ELDON of 18th April, 1813, reported 12 R. R. 255, 1 Vesey & Beames, 422, affirmed by the House of Lords.]

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THE KING *v.* FERNANDES.

EXCEPTION TO TITLE.

(12 Price, 862—863.)

 MICH. TERM.  
 1820.  


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 [ 862 ]

A Deputy Assistant Commissary General held to be a Public Accountant within the meaning of the statutes subjecting the property of certain accountants with the Crown to seizure and sale, for satisfaction of the balance against them.

THE defendant had been, for many years, Assistant Commissary General to the British forces in the islands of Sicily and Malta. In 1805 he delivered in his account (upon oath) to the Commissioners for auditing the Public Accounts, whereby he admitted a very considerable balance to be due from him to the Crown.

The accountant being in embarrassed circumstances, the Commissioners for auditing the Public Accounts adopted the usual proceedings to recover the balance; and ultimately an extent was issued against him; and a freehold estate, his property, was seized under it into the King's hands.

That estate was afterwards sold by the Deputy Remembrancer, under the usual order of the Court. The principal purchaser took several objections to the title; and it was referred to the Deputy Remembrancer to investigate and certify the title, who overruled the objections, and reported that a good title could be made to the estate. The purchaser excepted to the Deputy Remembrancer's report, which brought the points made before the Court of Exchequer for argument.

THE KING      The first exception was, that it did not appear by the  
FERNANDES.      proceedings that the said Alexander Fernandes was a public  
[ 863 ]      accountant within the meaning of the statutes under which the  
estate had been ordered to be sold.

When the exception came on for argument,

*Boteler*, for the purchaser, was heard in support of the objection ; and

The *Attorney-General* and *Roupell* for the Crown, in support of the Deputy Remembrancer's report ; when

The COURT disallowed the exception.

*Report confirmed.*

THE ATTORNEY-GENERAL *v.* LE MERCHANT.†

(1 T. R. 201, n.—203, n.)

1788.

[ 201, n. ]

THIS cause first came on to be tried before Eyre, Baron, in the Exchequer, on the 4th of December 1772. It was an information grounded on the statute 7 Geo. I. c. 21, s. 9, for importing tea into Guernsey without having first been laden and shipped in Great Britain, which subjected the goods and the vessel to a forfeiture. In the course of the trial, the *Attorney-General* offered to read some letters concerning this tea, which had been sent by the defendant to Channon, a witness for the Crown, which letters were proved to have come to the defendant's hands under an order made by the LORD CHANCELLOR for the delivery up to him of all papers and letters seized under a commission of bankrupt against Channon, among which were these letters. The solicitor of the Excise had contrived to take copies of them whilst they were in the hands of the clerk of the commission; and notice having been given to the defendant to produce the original letters, and that being refused, the *Attorney-General* offered to read these copies. This was objected to by the counsel for the defendant, upon the ground principally, that a defendant in a criminal case was never bound to produce evidence against himself; that he was guilty of no crime in not producing them; and that the *Attorney-General* had no right to call upon him to produce them, or ask a single question concerning them; consequently no copies could be admitted in evidence. But EYRE, Baron, admitted the evidence, though he said he had some doubt about it. He conceived that the principle on which copies were admitted as evidence was this, that they were the best evidence which the nature of the case would admit of, or that was in the power of the party producing them to give; and not on the idea of any crime in the person, in whose possession the originals were, refusing to produce them. And he thought there was no difference between civil and criminal cases.

Other objections, observed upon in giving judgment, were taken on behalf of the defendant, which were over-ruled.

† See the Preface.

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Afterwards, on a motion for a new trial,

r.  
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THE LORD CHIEF BARON said:

This cause came before the Court on a motion for a new trial. My brother EYRE reported the case, as stated in the information, as upon an Act of Parliament made in the 7 Geo. I. c. 21, to prevent importing tea into Guernsey. He stated, that an objection was taken upon the cross-examination to the evidence of the people who gave an account of the transaction; therefore the plaintiff, in order to support their credit, produced some letters under the hand of the defendant, of which they had taken copies, the originals being in the hands of the defendant, and therefore there was a notice proved to his agent, his attorney, and likewise to himself; and upon that my brother EYRE was of opinion, according to the general rule, that, where papers are in the hands of the adversary, copies might be given in evidence. These copies made the case so strong for the *Attorney-General*, the plaintiff, that if they were regular and proper evidence, the case was fully proved. On the other hand, if the copies of these letters were not proper evidence, the jury might have found otherwise. The question now is, whether that evidence were properly admitted or not? If it were improperly admitted, there ought to be a new trial; if properly admitted, there ought not. Then another objection was, that this Act could not have effect in Guernsey, as the usage was to have all the Acts of Parliament at Guernsey registered, and that this Act was not. My brother refused to let in that evidence to prove the usage; because if it be the law of the land, there is no occasion to state it: on the other hand, if it be not the law of the land, but is contrary to it, it will have no effect. Now the question comes to be, therefore,

[ \*202, n. ] Whether these copies of letters were properly admitted as \*evidence or not? And that depends upon the exceptions which were taken to it by the gentlemen at the Bar in the motion for a new trial. First, it was objected, that copies of letters or papers in the hands of the adversary ought not to be read in criminal cases; that was one general objection. And the other, that supposing, for argument's sake, they ought to be admitted, yet in this particular instance the notice which was given was not sufficient. As to the first objection, that copies are not admissible in any criminal case,

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because that would be to oblige a man to produce evidence against himself; in answer to it, I do not recollect that they have produced any one case to shew any difference at all as to the rule of evidence in criminal, and in civil cases; therefore the rule of evidence in both cases is the same, that is, to have the best evidence that is in the power of the party to produce, which means that, if the original can possibly be had, it shall be required, but if that original be destroyed, or if it be in the hands of the opposite party who will not produce it, then in case of a deed, a counter one, or sometimes a copy of the deed, or copy of the paper, is evidence to be admitted. But it is said that this does not hold in criminal cases, because the consequence of it would be to compel a man to produce evidence against himself; and it is a rule of law, that a man in criminal cases is not compellable to produce evidence against himself; for this purpose the case of *The King v. Parnell* in the King's Bench, and the case in *Sir John Strange*, 1210, were relied upon. Now, with respect to this, I take it that the rule is certainly true, and the cases that were cited to this purpose are unquestionably right, and law; but they do not apply to the present case. *The King v. Parnell* was in Hil. 22 Geo. II. 1748. I heard the motion. There had been an information against Doctor Parnell, the defendant, who was Vice-Chancellor of Oxford, for refusing to act upon a complaint against some scholars; and the motion was the common motion for a rule to shew cause why the *Attorney-General*, and those authorized by him, should not inspect all the public books, archives, records, &c. in the custody of the proper officer, to take copies. The *Attorney-General*, *Sir Dudley Ryder*, narrowed his demand, and desired only to see the statutes of the University, but the Court refused it, because it would be to compel the defendant to produce evidence against himself; for if the Court had granted this rule for the inspection, and the Doctor had disobeyed it, he would then have been liable to an attachment. So in the case in *Strange*, 1210. Upon that rule, if they had obeyed it, they would have been compelled to produce evidence against themselves, and have been subject to an attachment if they had not. But the defendant, *Le Merchant*, is not compellable to produce those letters against himself; for he is



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liable to no punishment at all if he do not, but is left at his entire liberty either to do it or not; the only consequence must be, that these copies (which must be sworn to be true copies) are read against him. If they be not true copies, he has it in his power to prove that by producing the originals. It was likewise said, in support of the motion, that the reason why copies are permitted to be evidence in common cases is, because the party who has them in his custody, and does not produce them, is in some fault for not producing them; it is considered as a misbehaviour in him in not producing them, and therefore, in criminal cases, a man who does not produce them is in no fault at all; and for that reason a copy is not admitted. But I do not take that to be the rule: it is not founded upon any misbehaviour of the party, or considering him in fault: but the rule is this; the copies are admitted when the originals are in the adversary's hands, for the same reason as when the originals are lost by accident; the reason is, because the party has not the originals to produce. Two of my brothers, who have been in an office that has given them an opportunity of a greater degree of experience in criminal law than most of the Judges, do not recollect any difference being made between civil and criminal cases. One of my brothers has \*mentioned a case exceedingly apposite to the present, which is *Layer's* trial:† there the charge against him was an overt act in publishing a treasonable paper in the county of Essex: a witness proved he did produce a paper doubled, and shewed him only part of the paper doubled, and then put it in his pocket; he remembered some lines of it; this was parol evidence of the contents of the paper; the purport of which was to excite the nation to an insurrection, and to shake off the miseries and calamities they were under from the present Ministry. In that case no objection was made by the counsel *Mr. Hungerford* and *Mr. Kittleby*; no difficulty was made in this evidence; they seem to say that the whole ought to be produced; that it was only part, and therefore took off the force of the evidence; they did not object to that man's giving parol evidence of the contents of the paper in the hands of a prisoner; and that in a case of high treason. And there *Mr. Philip Yorke*,

[ \*203 n. ]

† 6 St. Tr. 229.

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Solicitor-General, said, "after this paper was produced, the prisoner took it back, put it into his pocket, and kept it; therefore the paper itself being in his custody we were properly admitted to prove the contents of it by parol evidence." This is not contradicted by the Court, and though it is only the saying of one counsel, yet not being contradicted at all it is very strong. Another objection has been made that this notice is not sufficient: the answer is, I know no difference between the rule of evidence in civil and criminal cases. Then, if there be no such difference, the rule which has always been followed and allowed in civil cases is that notice be given to the attorney or agent† of the adverse party. Now in this case, without going minutely into the consideration, whether the notice was proved to the defendant himself, and was good, here is unquestionable notice proved to Sayer who is the agent and solicitor of Le Merchant, into whose hands it appears that these letters had actually been delivered; and then there is a notice likewise to Davey, who is the attorney for the defendant in this very cause, and no attempt was made on the part of the defendant to prove what was become of these letters, or that it was not in his power to produce them. The last objection is this, that they were not permitted to give evidence of the not registering the Act of Parliament, and in short to take off the force of the Act, because it was not registered. Now this is an objection which goes to the power of the Legislature of this kingdom; an objection which will never be permitted to be made in a court of justice, because it is without the least colour or foundation. No man who knows anything of the constitution of this country can deny the power of the Legislature to bind all the subjects of it in every part of the world; the only difference is, that some of these parts are not bound by Act of Parliament unless specially named; but if they are, they are bound as much as any part of Great Britain; and if we were to allow objections of this kind, it would be followed by one of these absurdities. In the first place, if it be in the power of the people of Guernsey to register or not as they think proper, the consequence would be, that they would have a power of controlling the Legislature: on the other hand, if the King will not order these Acts to be regis-

† Vide *Cates v. Winter*, 3 T. R. 306.

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tered, he would have a power of dispensing with the law ; which law is of the whole Legislature : it is therefore attended with one or other of these consequences, both of which are absurd ; consequently there is no colour or foundation for that part of the objection. I think I have considered, as well as I could, all that was mentioned by the counsel, and given such answers as occur to me ; therefore I am of opinion that the directions of my brother EYRE were perfectly right, and consequently there ought not to be a new trial.

*Rule discharged.*

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The overseer and constable afterwards distrained for poor-rates. Held, that the assignment was good in law, and in an action against the overseer and constable, no demand of the warrant under 24 Geo. II. c. 44 was necessary. *Ball v. Robinson* . . . . . 640

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from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away the bills to their customers as they thought fit. The bankers having become bankrupts, it was held, that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer at the time of the bankruptcy. *Thompson v. Giles* . . . . . 392

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Held, that that sum could not be proved by the partnership of two, against the estate of the banking firm, because it was not a debt arising from dealings in those articles which were the subject of the separate trade.

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Though the public interest could not be bound by the agreement, nor by the acquiescence of the shareholders and commissioners, it is not competent to shareholders to impeach that agreement in respect of public interest. *Gray v. Chaplin* . . . . . 22

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Reluctance of the Court to compel a corporation to make a discovery of the property which they possess applicable to general corporate purposes.

In the reign of Henry VII., lands were given to the corporation of Exeter and their successors, for the aid and relief of the poor citizens and inhabitants of Exeter, "who are heavily burthened by fee-farm rents of that city, and other impositions and talliages:" Held, (Lord ELDON doubting) that the rents ought to be applied to the relief only of such poor inhabitants of Exeter as do not receive parish relief.

It is not a due administration of such a charity to apply the rents to the payment of fee-farm rents due from the city, repairing the gaol, maintaining the prisoners, and other public purposes. *Att.-Gen. v. Corporation of Exeter* . . . . . 2

— 2. — Acceptance of sum in settlement of balance due.—A corporation, which had been in possession of charity lands from 1629, admitted by their answer, that they had retained the surplus rents, and applied them to corporate purposes distinct from those of the charity, always charging themselves in their books of account with the sums so retained; and they submitted to account as the Court should direct; but no books were produced which went back farther than 1747: Held, that the corporation must be decreed to account from 1629.

Where, upon an account extending over an unusually long period of time, a large balance was found due from a corporation to a charity, the LORD CHANCELLOR referred it to the *Attorney-General* to certify, whether it would be proper that the charity should accept a less sum in lieu of the balance stated in the Master's report; and, the *Attorney-General* having certified that it would be proper that the charity should accept a sum less than one half of that balance, the certificate was confirmed, and a decree made accordingly. *Att.-Gen. v. Mayor, &c. of Exeter* . . . . . 105

— 3. — Payment of money into Court—Allowance to relators.—Where the income of estates given to a corporation for specific charitable purposes has, for a long series of years, been misapplied, an indefinite account will not be directed against the corporation.

*Semble*: That the account will not be carried back beyond the filing of the bill.

Where, upon an information to establish and administer a charity, it appeared from the report that sums belonging to the charity were in the hands of the defendants, but no account had been directed against them by the decree, no order could be made that they should pay the money into Court. *Att.-Gen. v. The Corporation of Winchester* . . . . . 223

**CHARITABLE TRUST—4. School—Special trust for payment of masters and maintenance of buildings—Surplus income.**—A testator, by his will dated in 1558, after reciting that he had erected a free grammar-school at Tonbridge, did, for the maintenance and continuance thereof, give unto the master and wardens of the Skinners' Company various messuages, specifying their respective yearly values, which amounted in the whole to 60*l.* 13*s.* 4*d.*; then, proceeding to direct how the rents should be applied, he ordered that 20*l.* should be paid yearly to the master of the school, and 8*l.* to the usher; that the master and wardens of the Skinners' Company should visit the school once a year, for which they were to have 10*l.* yearly; that 4*s.* a week should be paid to certain almsmen; that 25*s.* 4*d.* yearly should be expended in coals, to be distributed among the almsmen; and that the renter-warden should have 10*s.* for his pains: the residue of the rents were to be employed by the master and wardens upon the needful reparations of the messuages and tenements, and the overplus was to go to the use and behoof of the Skinners' Company, to order and dispose of at their wills and pleasures: Held, upon the recitals and language of two private Acts of Parliament, which the Skinners' Company had accepted, that certain of the lands, the yearly rental of which in 1558 was 43*l.*, did not pass by the will, but were subject to a prior trust, which was exclusively for the support of the master and under-master of the school, and for the reparation of the lands and tenements; and that the increased rents of those lands were to be applied to the maintenance of the school on an enlarged scale: That the Skinners' Company were entitled to the rents and profits of the remainder of the premises mentioned in the will for their own use and benefit, subject only to the payments to the almsmen and renter-warden, to the payments for coals, and to contribution towards the expenses of repairing such part of the premises used for a school as had been originally erected for that purpose, as well as towards an increased sum of 200*l.* yearly allowed to the company for the expenses of visiting the school. *Att.-Gen. v. The Skinners' Company* 126

— 5. **Trustees—Costs of unsuccessful attempt to obtain statutory sanction.**—Trustees of a charity cannot be allowed the costs of an unsuccessful attempt to obtain an Act of Parliament to enable them to administer the property of the charity on an improved plan, though their failure arose from accidental circumstances, and though their motives were fair and proper. *Att.-Gen. v. E. of Mansfield* . . . . . 155

— 6. **Trustees—Parties in individual and corporal capacities.**—The trustees of a charity were made, as individuals, defendants to a suit for the administration of the charity; afterwards the information was amended, and they were made defendants in their corporate capacity, but the suit was not dismissed against them as individuals: at the hearing, the record was considered as constituting two different causes; and the cause against the trustees as individuals was dismissed with costs, though, in the cause against them in their corporate capacity, a decree was made, remedying abuses which had grown up in the charity, and regulating its future administration. *Ibid.*

— 7. **Improper lease of charity lands—Cancellation—Personal covenants of trustees.** See *Landlord and Tenant*, 1.

**CHURCHWARDEN—Action by—Joinder of parties—Joint parishes—Separate rates.**—In the parish of A., two churchwardens were elected for the township of B., and two others for the rest of the parish. Separate rates were made for these divisions: Held, that the churchwardens elected for the township of B. might maintain an action against their predecessors for money remaining in their hands, and were not bound to make all the present or late churchwardens of the parish plaintiffs or defendants. *Astle v. Thomas* . . . . . 348



**COMPANY**—Remarks of the Lord Chancellor on the supposed illegality at common law of the sale of shares by promoters in companies promoted by them. *Kinder v Taylor* . . . . . 226

And see Canal.

**CONSIDERATION**—Want of. See Contract, 1.

**CONTRACT**—1. Consideration—Construction of correspondence as constituting an agreement.—A son grants an annuity secured upon a living, of which he is incumbent and his father patron: The annuitant having proceeded to a sequestration of the living, for payment of his arrears, the father assures him that he will sell the advowson, and redeem the annuity out of the proceeds of the sale, and the annuitant, relying on that assurance, withdraws the sequestration; subsequently, the advowson is sold, and the son vacates the living, so as to defeat the annuitant's security: Held, that the annuitant cannot compel the father to perform his agreement to redeem, inasmuch as that agreement was an agreement without consideration. *Simpson v. Hill* . . . . . 178

— 2. Illegal consideration—Gambling in stocks.—Debt on bond, conditioned for the payment of money by instalments. Plea, that defendant, by W., as his agent, made unlawful contracts for buying and selling shares in the public stocks; that these contracts were not specifically performed, but that W., as the agent of the defendant, voluntarily paid 500*l.* for differences against the form of the statute, and that for securing the repayment of that money to W., the defendant gave his promissory note to W., and that long after the same became due. W. indorsed it to the plaintiffs, and that the plaintiffs afterwards threatened to commence an action upon the note against the defendant; and the defendant, in fear of the action, did, at the request of the plaintiffs, give the bond in question, which the plaintiffs accepted in lieu of the promissory note, and the money secured thereby, they well knowing that the note had been made by the defendant on the occasion, and for the purpose in the plea mentioned: Held, that this plea was an answer to the action, inasmuch as the plaintiffs took the promissory note after it was due, and had notice of the illegality of the original consideration before the bond was given. *Amory v. Merryweather* . . . . . 467

— 3. — Agreement made to avert prosecution—Duress.—A court of equity will not enforce an agreement against a party, who was induced to enter into it in order to save his sons from a threatened prosecution for felony. *Dewar v. Elliott* . . . . . 214

— 4. Purchase of concern subject to third party's consent—Taking possession as evidence of waiver of condition.—A party agreed in writing to purchase the mail coach concern between Derby and Leicester, provided the postmaster consented. The party afterwards took possession of it with the risk of obtaining that consent: Held, that the proviso had been waived. *Mansfield v. Cheslyn* . . . . . 627

— 5.—By person representing numerous body—Joinder of parties. See Practice, 5.

— 6. Novation. See Partnership, 6.

And see Sale of Goods; Vendor and Purchaser.

**COPYHOLD**—Admission—Mandamus.—The Court will, as a matter of course, grant a mandamus for the admission of a person to copyhold premises, that he may try his right to them. *Anonymous* . . . . . 628

**COPYRIGHT**—1. Copyright in tables—Acquiescence in trifling infringement. *Bailey v. Taylor* . . . . . 225

— 2. In encyclopædia—Equitable title to work.—The Court will interfere to protect copyright from piracy, at the suit of plaintiffs, who appear to have a good equitable title, even though it should not be quite clear that their legal title is complete.

Mode in which the Court exercises its jurisdiction where one work of compilation, such as an encyclopædia, copies matter from a preceding work of the same description. *Mawman v. Tegg* . . . . . 112

— 3. Oral lectures delivered from notes previously made and committed to memory—Injunction.—Where the Court is called upon to restrain a publication, on the ground that it is a piracy of a composition which has been substantially reduced into writing; it is the duty of the Court to see that the plaintiff produces his written composition.

An injunction will not be granted to restrain an alleged piracy of lectures delivered orally, when no written composition substantially the same with these lectures is produced.

Persons attending an oral lecture have no right to publish it for profit.

An action upon the implied contract will lie against a pupil attending an oral lecture, who causes it to be published for profit.

The Court will grant an injunction against third persons publishing lectures orally delivered, who must have procured the means of publishing those lectures from persons who attended the oral delivery of them, and were bound by the implied contract. *Abernethy v. Hutchinson* . . . . . 237

— 4. Work first published abroad—Parol consent to publication in England—Publication of rival edition before actual assignment.—An author publishes his work in a foreign country in 1814, and afterwards agrees to sell to A. the exclusive right of printing the same work in this country, but no agreement or consent in writing was then entered into. A. publishes the work in September, 1814, in England. In 1818, B. publishes the same in England. In 1822, the author, by an agreement in writing, assigns to A. the exclusive right of printing the work in England: Held, that A. did not, by the parol consent given by the author in 1814, acquire the exclusive right of publishing the work in England: secondly, that that could not be deemed a publication by the author, not being made on his account or for his benefit: thirdly, that the publication by B. in 1818, was a lawful publication: and, fourthly, that the author could not afterwards, in 1822, by making a valid assignment to A., enable him to maintain an action against B. for selling a copy of the same work after such assignment was executed. *Clementi v. Walker* . . . . . 569

**CORPORATION (MUNICIPAL)**—1. Election of members—*Mandamus*.—The Court will not grant a *mandamus* to compel a corporation to elect members of an indefinite body, unless a strong case of necessity is shewn.

*Best*, J., dissenting from the opinion of the majority, thought that a case of necessity was constituted by reason that the corporation had been reduced to a state such that there was no choice of persons to fill up the offices which by the charter are directed to be filled up by election. *R. v. Mayor of Fowey* . . . . . 473

— 2. Breach of trust by. See *Charitable Trust*, 1—3.

**COSTS.** See *Practice*, 1—4; *Charitable Trust*, 5; *Solicitor and Client*, 2.

**CRIMINAL LAW**—1. Criminal information—Rule *nisi*.—When a person has obtained a rule *nisi* for a criminal information, the Court of King's Bench will not compel him to make it absolute. *R. v. Sherwood*. 626

**CRIMINAL LAW**—2. Obstructing course of justice—Theatrical representation of person committing criminal offence.—It is a misdemeanour to prejudge a criminal case by representing, in a theatrical exhibition, a man in the act of committing the offence. *R. v. Williams* 624

— 3. Penal statute—removal of proceedings under.—A *certiorari* always lies to remove proceedings under penal statutes, unless it is expressly taken away, and an appeal never lies unless it is expressly given by the statute. *R. v. Justices of Cashiobury* . . . . . 604

— 4. Defect in proceedings.—This Court will not take notice of any formal defect in the proceedings under a penal statute, unless it appears on the face of the conviction itself. *Ibid.*

— 5. Perjury, Indictment for—Dying declaration. *See Evidence*, 2.

*And see Habeas Corpus.*

**CUSTOM**—1. Usage for twenty years.—A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom. A custom for the steward of a court leet to nominate certain persons to the bailiff, to be summoned on the jury, is a good custom. *R. v. Joliffe* . . . . . 264

— 2. For in-going tenant to pay value of way-going crop. *See Landlord and Tenant*, 10.

*And see Licence.*

**DEED**—Delivery. *See Escrow.*

**DEFAMATION**—1. Information—Libel on sovereign—Malice.—A libel imputed that his Majesty laboured under mental insanity; and it stated that the writer communicated the fact from authority. Upon the trial of the information, the publication of the libel was proved. It was admitted by the defendants that the statement in the libel was untrue, and they did not offer any evidence to shew that they had any authority for making it; and the Judge in his charge to the jury having stated that it was a criminal act to assert falsely of his Majesty or of any other person that he was insane, and it being admitted by the defendants themselves that the fact stated in the publication was false, in his opinion it was a libel: Held, that this direction was correct in point of law, and that the Judge was warranted in saying that the defendants had admitted the charge contained in the libel to be "false."

The jury having retired for a considerable time, returned into court, and desired to know whether it was necessary that there should be a malicious intention in order to constitute a libel; to which the Judge answered, "The man who publishes slanderous matter calculated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can shew the contrary; and it is for him to shew the contrary:" Held, that this answer was correct in point of law, and that the Judge was not bound to answer in the affirmative or negative the abstract question put to him; and assuming that a malicious intention is necessary to constitute a libel that intention is to be inferred from the mischievous tendency of the publication itself, unless the defendant shews something to rebut the inference. *R. v. Harvey* . . . . . 337

— 2. Justification—Plea proved in some particulars only.—Where a libel charged the plaintiff with various acts of cruelty to a horse, and amongst others, with knocking out an eye, and the defendant pleaded that the charge was true in substance and effect; the jury having found that it was true in all particulars, except that the eye was not knocked out: Held, that the justification was not proved, and that the plaintiff was entitled to a verdict on that plea. *Weaver v. Lloyd* . . . . . 515

**DONATIO MORTIS CAUSA**—Imputation of fraud—Presumption.—Executors brought an action of trover to recover possession of a promissory note, which it was said had been given by the deceased to a confidential female servant, who claimed it as *Donatio mortis causâ*. The jury found a verdict for the plaintiffs.

The Court would not grant a new trial, observing that it required a strong case to rebut a suspicion of fraud, when the party had access to keys and drawers. *Simms v. Cox* . . . . . 646

**EASEMENT**—Right of way—Underlease—"All ways thereunto appertaining."—Where a lease of premises described them as abutting on "an intended way of thirty feet wide," which was not then set out, and the soil of which was the property of the lessor; and an underlease was granted, describing the premises as abutting on "an intended way," not mentioning the width: Held, that the underlessee was entitled to a *convenient* way only, and could not maintain an action against the owner of the soil for narrowing the road to twenty-seven feet, no actual injury having been sustained.

The underlease was of premises "together with all ways thereunto appertaining." A right of way over the original lessor's soil would not pass by those words. Per HOLBOYD, J. *Harding v. Wilson* . . . . . 287

**ELECTION.** See *Power*.

**ELEGIT**, Writ of. See *Execution*, 2.

**EQUITABLE WASTE.** See *Waste*.

**ESCROW**.—A subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before and at the time of the execution, it was agreed that it should remain in his (the subscribing witness's) hands until the death of A. B., and until certain securities were given up, and that the bond was given up to him upon that condition: Held, that it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. B., and until the notes were delivered up.

Semble, That it is not essential in order that an instrument should operate as an escrow only, that it should be expressly declared at the time when it is executed, that it was not to operate as a deed until a given event happened. *Murray v. The Earl of Stair* . . . . . 282

**ESTOPPEL.** See *Bill of Exchange*, 1.

**EVIDENCE**—1. Of printing of play-bill.—A man's name appearing at the bottom of a play-bill, is not, of itself, *prima facie* evidence that he printed it. *R. v. Williams* . . . . . 624

—2. Indictment for perjury—Dying declaration of prosecutor.—Defendant having been convicted of perjury, a rule *nisi* for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor, and on showing cause against the rule an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose: Held, that it could not be read; for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration. *R. v. Mead* 484

**EXECUTION**—1. Levy on goods of another—Damage to goods—Trover.—If the sheriff take the goods of one man under an execution against the goods of another person, and restore them before a suit commence, yet an action of *trover* can be maintained against him.

And if any of the goods are damaged by the omission of some act which the owner would have done, if the sheriff had not seized the goods, the sheriff is liable to answer in damages for that injury. *Robinson v. Walker* . . . . . 631

**EXECUTION**—2. Writ of *elegit*.—Copyhold lands cannot be extended under an *elegit*, but, if the inquisition comprehends both freehold and copyhold, it may be good as to the former, and bad as to the latter.

Where, under one *elegit*, a moiety of defendant's lands were taken to satisfy a judgment; and under a second *elegit*, the whole of the remainder of his lands were taken instead of a moiety of the moiety:—Held, that the second *elegit* was a mere nullity, and there was no occasion to apply to the Court to set it aside. *Morris v. Jones* . . . . . 620

**EXECUTOR AND ADMINISTRATOR**—Retainer—Assets both in England and India—Claim of Indian administrator to retain for both specialty and simple contract debts.—An administrator in India, being a creditor of the intestate by specialty, and also by simple contract, possesses himself of assets not sufficient to discharge the two debts which are due to him, and claims against the assets possessed by another administrator in England: Held, that his right of retainer must be exercised in satisfaction of the specialty debt, and that he will rank only as a simple contract creditor upon the assets in England. *Johnson v. Ward* . . . . . 202

**EXTENT.** See *Mortgage*, 1.

**FALSE IMPRISONMENT**—Removal from church—Person reading notice in church after clerk has refused to read it.—Where the parish clerk refused to read in church a notice which was presented to him for that purpose, and the person presenting it read it himself at a time when no part of the church-service was actually going on: Held, that although a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally detain him afterwards in order to take him before a magistrate. *Williams v. Glenister*. 525

**GAME**—What is—Books. See *Rookery*.

**GAMING.** See *Contract*, 2.

**GOODS, SALE OF.** See *Sale of Goods*.

**HABEAS CORPUS.**—When the Court of King's Bench grants a *habeas corpus* to a prisoner may be admitted to bail for a crime, they always direct a *certiorari* to issue, to bring the depositions into that court.

If the party is poor, they will order him to be bailed before two magistrates in the country. *R. v. Gittus* . . . . . 647

**HARBOUR**—Repair.—Trespass for breaking and entering the plaintiff's manor. Pleas, first, general issue; second, that from time immemorial there hath been and still is a public port partly within the said manor, and also in a river which has been a public navigable river from time immemorial, and that there is in that part of the port which is within the manor, an ancient work necessary for the preservation of the port, and for the safety and convenience of the ships resorting to it; that this work was at the several times when, &c. in decay; that plaintiff would not repair it, but neglected so to do, wherefore defendants entered and repaired. Replication, *de injuria*. Verdict for plaintiff on first plea, and for defendants on the second: Held, that plaintiff was entitled to judgment *non obstante veredicto*, as the second plea did not state that immediate repairs were necessary, or that any one bound to do so had neglected to repair after notice, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port. Quære, Whether the plea would have been good had it contained those allegations. *The Earl of Lonsdale v. Nelson* . . . . . 363

**HIGHWAY**—1. Elevation of—Injury to adjoining property—Statutory powers.—By the general Turnpike Act, the trustees of roads are authorised to divert, shorten, alter, or improve the course or path of any of the roads under their management, and divert, shorten, vary, alter, and improve

the course or path of any roads through or over any commons or waste grounds, or uncultivated lands, without making satisfaction for the same; and through or over any private lands, tendering or making satisfaction to the owners thereof and persons interested therein for the damage sustained thereby: Held, that under this clause, the trustees are authorised to lower hills and raise hollows: Held, secondly, that the trustees are not liable to an action for a consequential injury resulting from an act which they are authorised to do. *Boulton v. Crowther* . . . . . 528

**HIGHWAY**—2. **Repair—Indictment.**—An indictment stated that a certain way was an ancient common highway, and that a certain part situate in an extra-parochial hamlet was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair it: Held, that this indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorially bound to repair; nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair. *R. v. The Inhabitants of Kingsmoor* . . . . . 307

**HUNDRED**—**Liability for injury to property—Action by insured owner.**—Where the owner of certain stacks of hay and corn, which were maliciously set on fire, received the amount of his loss from an insurance office: Held, that he might nevertheless maintain an action against the hundred on the 9 Geo. I. c. 22. *Clark v. The Inhabitants of Blything* 334

**HUSBAND AND WIFE**—**Separation deed—Arrears of annuity secured under—Subsequent decree of divorce.**—By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds: Held, that this deed was legal and binding, and that a plea by the husband, that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce *à mensa et toro* was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity. *Jee v. Thurlow* . . . . . 453

**INFANT**—1. **Custody—Interference of Court—Immoral conduct of father.**—Jurisdiction of the Court to control the legal rights of a father over his children, on the ground of his immoral conduct. *Wellesley v. Duke of Beaufort* . . . . . 1

—2. **Property of—Person in adverse possession—Account.**—A person who makes an adverse entry into, and takes an adverse possession of an infant's estate, cannot be treated as the bailiff of that infant; nor can a bill for an account against him in that character be sustained. *Hagley v. West* . . . . . 221

And see **Arbitration**, 3.

**INJUNCTION**—1. **Against equitable waste.** See **Waste**.

—2. **Solicitor—Restriction against practising in particular district.** See **Solicitor**.

And see **Chapel**; **Copyright**.

**INSURANCE (LIFE)**—**Money payable six months after proof of death—Interest.**—In covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured are not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A. *Higgins v. Sargent* . . . . . 379

**INSURANCE (MARINE)**—1. **Abandonment—Wreck—Total loss—Ship on rocks.**—Where a ship by perils of the sea has got upon rocks, and is lying there so much injured as not to be capable of being got off and repaired at all, or not without an expense exceeding her value when repaired, the assured may recover for a total loss without giving notice of abandonment. *Cambridge v. Anderton* . . . . . 517

— 2. **Adjustment of loss—General average.**—A loss by general average is to be calculated between owner of ship and the owner of goods according to the law of the port of discharge. *Simonds v. White* . . . 560

— 3. **Sale of cargo to defray cost of repairs.**—Upon a policy of insurance on goods, the ship being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; and in order to defray the expenses of the repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses: Held, that the underwriter was not answerable for this loss. *Sarguy v. Hobson* . . . . . 251

**INTEREST**—Liability of surety for—Balance due from insolvent receiver. See **Principal and Surety**, 1.

And see **Insurance (Life); Limitations, Statute of.**

**JURISDICTION**—Of Court of Admiralty. See **Admiralty.**

**LANDLORD AND TENANT**—1. **Cancellation of lease—Improper lease of charity lands—Personal covenants of trustees.**—Trustees of a charity grant an improper lease of the charity lands, in which they covenant with the lessee for his actual enjoyment of the demised premises during the term: The Court in setting aside the lease, will order the indenture of demise to be cancelled *in toto*, and will not leave the personal covenants of the trustees in force for the benefit of the lessee. *Attorney-General v. Morgan* . . . . . 81

— 2. **Covenant to repair—Fixtures erected by tenant under old lease.**—Lessee, who has erected fixtures for the purpose of trade upon the demised premises, and afterwards takes a new lease to commence at the expiration of his former one which new lease contains a covenant to repair, will be bound to repair those fixtures, unless strong circumstances exist to shew that they were not intended to pass under the general words of the second demise.

*Quære*, whether any circumstances dehors the deed can be alleged to shew that they were not intended to pass?

*Quære*, whether limekilns, erected for the purposes of trade, are removable? *Thresher v. East London Water Works* . . . . . 486

— 3. **Agreement of sub-lessee to repair.**—Where A. held premises under a lease containing a clause of re-entry for want of repairs, and afterwards underlet a part to B., who undertook to repair within three months after notice for that purpose; the premises underlet being out of repair, A.'s landlord threatened to insist upon the forfeiture if they were not repaired, and A. gave notice to B. to repair. The premises at the expiration of three months from that time remaining out of repair, A. entered and repaired: Held, that he might recover from B. the sum expended on that occasion. After the repairs were done by A., but before the commencement of the action, B. sold his interest in the premises to a person who pulled down and entirely rebuilt them: Held, that this did not deprive A. of his right to recover the whole sum expended by him. *Colley v. Streeton* . . . . . 350

**LANDLORD AND TENANT—4. Excessive distress for rent—Arrangement by tenant as to sale of goods seized—Waiver of right of action.**—Where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action by entering into an arrangement with him respecting the sale of the goods seized. *Willoughby v. Backhouse* . . . . . 566

— **5. Fraudulent removal of goods to avoid distress—Removal not actually effected by tenant.**—In an action on the 11. Geo. II. c. 19, against a tenant for fraudulently removing his goods to avoid a distress for rent, it is not necessary to shew an actual participation in the act, if the removal takes place with his privity. *Lister v. Brown* . . . . . 614

— **6. Holding over—Insistence on notice to quit—Evidence of tenancy.**—Where A., who held premises under a lease which expired at Midsummer, refused to give up the possession at that time, and insisted upon notice to quit, and afterwards continued in possession till Christmas, and paid rent at Michaelmas and Christmas: Held, that this was conclusive evidence of a tenancy, and that the landlord was entitled to recover a quarter's rent due at Lady-day. *Bishop v. Howard* . . . . . 291

— **7. Provision in lease—"Void."**—In a proviso in a lease, that, in certain events, the lease shall cease and be void, and the lessor may re-enter, the term "void" means voidable at the option of the lessor. *Dakin v. Cope* . . . . . 37

— **8. Re-entry for non-payment of rent—No actual demand of rent—Proviso in lease—Ejectment.**—Where a lease contained a proviso that, if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made:" Held, that the rent having been in arrear for the time specified, an ejectment might be maintained without actual re-entry, and without any demand of the rent. *Doe d. Harris v. Masters* . . . . . 422

— **9. Use and occupation—Landlord's title.**—Defendant came into possession of a house, under one R., in 1807. The property, in 1817, became vested in the plaintiff under a conveyance from the trustees under the Lottery Act, 46 Geo. III. c. 97. No rent was ever paid to the plaintiff, but he recovered in ejectment.

In an action for use and occupation, held that the plaintiff might recover; because the Act of Parliament created a privity of estate between the defendant and the trustees, to whom the title (such as it was) of R. was transferred by the operation of the Act. *Read v. Godwin* . . . . . 648

— **10. Way-going crop—Custom for in-going tenant to pay value of.**—A landlord and tenant entered into an agreement for renting a farm. The landlord covenanted that he or the in-coming tenant should pay for the work and seeds of the off-going crop. By the custom of the country the in-coming tenant was bound to pay for such labour and seeds. The landlord did not pay for them.

The off-going tenant brought an action on the custom, against the in-coming tenant, for a compensation.

The Court held that the agreement did not furnish a defence to the action; but that the in-coming tenant was liable. *Louth v. Enderby* . . . . . 642

**LIBEL.**—See Defamation.

**LICENCE—Custom for mayor to take fees.**—In assumpsit for money had and received, it was proved that Yarmouth has been a borough from time immemorial, and that until the time of Queen Anne the chief officers of the corporation were two bailiffs; and various charters had confirmed to them all the fees before received by them. By stat. 1 Ann. st. 2, c. 7 (local), all fees payable to the bailiffs were to become payable to the mayor when the style of the corporation should be changed, which was done by charter in the following year. At a meeting duly holden before the



defendant, then mayor, (he being by virtue of his office a justice of peace,) and another justice, for granting and renewing the licences of publicans, the plaintiff applied to have his licence renewed, and upon having it done, was required to pay, amongst other fees, the sum of 4s. to the mayor, which was proved to have been regularly paid for a period of sixty-five years: Held, first, that the defendant was not entitled to take any such fee; for the payment for sixty-five years did not raise a presumption that it had been immemorially paid to the bailiffs or mayor of Yarmouth, inasmuch as licences were not granted until the reign of Ed. VI., and the defendant, as justice of peace, was not entitled to any fee for granting the licence. Secondly, that the defendant was not entitled to notice of the action about to be brought against him, for that the fee could not have been taken by him as a justice, *colore officii*. Thirdly, that the payment was not voluntary so as to preclude the plaintiff from recovering the money in this action. *Morgan v. Palmer* . . . . . 537

**LIEN, EQUITABLE.** See Mortgage, 1; Partnership.

**LIMITATIONS, STATUTE OF—Promissory Note—Payment of interest by one joint maker.**—A. and B. made a joint and several promissory note. A. died, and ten years after his death B. paid interest upon the note. In an action brought upon the note against the executors of A., it was held that the payment of interest by B. did not take the case out of the Statute of Limitations, so as to make A.'s executors liable. *Atkins v. Tredgold* . . . . . 254

**LUNACY—Committee—Appointment of eldest son and heir-at-law—Security.**—Even the eldest son and heir-at-law of a lunatic will not be appointed one of the committees of his estate, without giving security, unless the Master reports that no person can be found to act as committee, who will give security. *In re Frank* . . . . . 148

**MAGISTRATE—Fees.** See Licence.

**MANDAMUS.** See Copyhold; Corporation (Municipal).

**MINE—Coal Mine—Conveyance to purchaser—Former grant of land with reservation of minerals.**—A. being seized in fee of the manor of F. and the demesne lands thereof, and of all the coal mines lying under the manor, enfeoffed C. D. of and in certain closes, except and always reserved to the feoffor, his heirs and assigns, *inter alia*, all the coals in all or any of the lands and premises, together with free liberty for the feoffor, and his heirs, and his and their assigns and servants, at all times thereafter, during the time that he (the feoffor) and his heirs should continue owners of the demesne lands of F., to sink and dig pits, or otherwise to sough and get coals, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the coals at his and their free will and pleasure; he, the feoffor and his heirs, paying to the feoffee, his heirs and assigns, such satisfaction for the damages as two neighbours, indifferently chosen by the feoffee and feoffor, their heirs and assigns, should from time to time award.

The heirs of the feoffor for a valuable consideration conveyed to a purchaser in fee the manor of F. and its demesne lands, with its appurtenances, and all the coal mines under (amongst others) the lands in question, &c.: Held, that the coals were, by the exception, reserved to the feoffor in fee, and therefore that they passed to the purchaser; and, that the latter was entitled, under the express liberty reserved, to enter upon the land, to dig pits, and get the coals, so long as he remained owner of the demesne lands.

*Semble*, That the express liberty is not restrictive of that which would be implied by law to get the coals, and that the purchaser would be entitled to an incidental right to get them co-extensive with his estate. *The Earl of Cardigan v. Armitage* . . . . . 313

**MORTGAGE—1. Equitable—Lien—Priority of equitable mortgage over extent.**—An agreement on borrowing (by recital in a bond) money, on the part of the borrower, that certain real property (freehold and leasehold) should stand pledged for repayment of it, and a delivery of the title-deeds, amounting in equity to a mortgage, or right to a mortgage, creates a lien binding as against the prerogative lien of the Crown in respect of a debt accruing due to the King subsequently: and the equitable mortgagees are entitled to be first paid their principal and interest out of the produce of the sale of the premises, the property of the Crown debtor, seized under an extent in chief.

Where part of the property so equitably pledged was leasehold, renewable by the lessee, and the equitable mortgagee had procured a renewal of the lease in the name of the lessee (the Crown debtor), by surrendering the original lease and taking a new one of the same premises after the Crown debt had accrued—such new lease, and the premises leased thereby, held to be subject to the equitable lien on the old lease, and the lien to be preferable to the demand on the part of the Crown against the Crown debtor in respect of priority of satisfaction out of the proceeds of the sale.

A further debt, so agreed to be secured by pledge of the property so equitably mortgaged, is also tantamount to a further equitable mortgage; and possession of the deeds by the first mortgagee is a possession by the second. *Fector v. Philpott* . . . . . 650

— 2. Mortgagee in possession—Cost of improvements.—A mortgagee, who has taken possession, will be allowed in his accounts the expense of buildings substituted for decayed old buildings, even though the new erections should be on an improved scale. *Marshall v. Cave* . . . 219

— 3. Occupation rent—Premises in state of dilapidation.—A mortgagee of a house, having taken possession of it, will not be charged with an occupation rent for it during a time when it was in so ruinous a state, that rent could not have been obtained for it. *Ibid.*

— 4. Priority—Loan of deeds for particular purpose—Sale of property—Non-disclosure of incumbrance—Fraud—Purchaser for value—Notice.—A mortgagee of a leasehold house gave up the indenture of lease to his mortgagor, in order that it might be shewn to an intending purchaser, who wished to see what the covenants in it were: the mortgagor concealed from the purchaser the fact of the existence of an incumbrance on the property, and produced the lease to him, and left it in his possession: within a week afterwards, the purchaser accepted a conveyance, paid his purchase money, and took possession of the house without any notice of the existence of the mortgage; but the solicitor of the mortgagee deposed, that, in an interview which he had had before completion of the purchase with the solicitor of the purchaser, he had informed the latter that a client of his was to receive a considerable sum out of the purchase money, and had requested to have notice of the time when the money was to be paid; and, though the solicitor of the purchaser denied that any such interview had taken place, before the completion of the purchase, a jury gave a verdict in favour of the statement made on that point by the solicitor of the mortgagee: Held, that the mortgagee was not to be postponed to the purchaser. *Martinez v. Cooper* . . . . . 49

— 5. To secure purchase money—Collateral charge on other property—Primary or collateral security.—The purchaser of an estate A., in order to secure the payment of the purchase money, executed a deed, by the first part of which another estate B. was mortgaged for the whole sum, and by the latter part of which, the estate A. was also mortgaged as a further and collateral security: Afterwards the two estates became the property of two different persons, who respectively derived title from the purchaser: Held, that the estate B. was the primary security, and that, as between the owners of the two properties, the estate A. was not to be resorted

to for the payment of any part of the mortgage debt, till the estate B. was exhausted. *The Marquis of Bute v. Cunynghame* . . . . . 72

**MORTGAGE**—6. Equitable—Deposit of deeds as security for future advances. See Partnership, 2, 3.

**NOTICE**—Of incumbrance, to purchaser. See Mortgage, 4.

**NOVATION**. See Partnership, 6.

**PARTNERSHIP**—1. Bankruptcy of partner—Right of assignees to share of subsequent profits.—A. being entitled, under a parol partnership agreement with B. and C., to three eighths of the capital and profits of the business, became bankrupt, being at the time indebted to the partnership in respect of bills in which the partnership name had been used for his personal accommodation: the assignees claimed a share of profits made subsequently to the bankruptcy, while the continuing partners insisted, that the bankrupt's interest in the profits ceased at that time; in consequence of this difference, no settlement of accounts between his estate and the partnership took place, and the assignees filed their bill; but B. and C., and afterwards C. alone, pending the litigation with the assignees, carried on the business for many years with the stock and capital which existed at the time of the bankruptcy, and stock and capital substituted in the usual course of trade for such former stock and capital, aided by the expenditure of considerable sums by C.: Held, that the assignees of A. were entitled to three eighths of the profits which had been made or should be made until the concern was finally wound up, and to three eighths of the money to be produced by the sale of what remained in specie of the capital and stock:

That A.'s proportion of the profits was not to be lessened, nor the proportion of C. to be increased, in respect of the debt which A. owed to the partnership, or of the money which C. brought into the business, beyond his share of the original capital.

Where a dissolution of a partnership for a term of years is set aside as fraudulent, after the expiration of the term, the business having been in the meantime continued, the partner who had been improperly excluded, has a right to an account, not only till the end of the term, but till a final settlement takes place. *Crawshay v. Collins* . . . . . 83

— 2. Deposit of deeds with firm having nominal partner—Death of nominal partner—Agreement with new firm—Lien.—Deeds are deposited with a firm of five partners, one of whom was a nominal partner, as a collateral security for advances by the firm, which are secured by bond; the nominal partner being dead, it is agreed that the four surviving partners shall hold the deeds as a collateral security for sums secured by a second bond, in addition to a former bond: Held, that under this agreement, the partnership of four has an equitable lien on the estates comprised in the deeds, to the extent of the sums due on both bonds. *Ex parte Alexanders, Re Tills* . . . . . 207

— 3. — Title-deeds are deposited with a partnership upon an agreement by parole, that they shall be a security for future advances, and a change of partners afterwards takes place: the security may be extended by parole to future advances by the new partners. *Ex parte Lloyd, re Ablett* 211

— 4. Dissolution—Partner's general right to dissolve partnership.—Construction of articles of partnership with respect to the power of dissolution. The general right, which every member of a partnership has to dissolve a partnership, will not be controlled except by clear expressions. That right will not be controlled by the partners taking a lease for years of the premises on which the trade is to be carried on: Nor by provisions in the articles as to the amount of capital to be brought in by the several partners in successive years: Nor by provision for the event, where the partners are in number more than two, of the exclusion of one of them by the others. *Baxter v. Plenderleath* . . . . . 200

**PARTNERSHIP**—5. **Dissolution—Right of partner to nominate successor—Refusal of person nominated to act.**—Where a partner has a right to appoint a person to succeed, upon his death, to his share of the business, and the person so appointed refuses to accept that share, or to comply with the stipulations of the articles, the partnership is dissolved; but the dissolution is not a dissolution which is wrought by the exclusion of the appointee by the surviving partners. *Kershaw v. Matthews* . . . 13

— 6. **Loan to firm—Death of partner—Novation.**—Where money has been lent originally to a partner in an old firm, and he dies; what shall be sufficient evidence that the creditor adopted the new firm as his debtors.

If the creditor, being also one of the executors of his original debtor, makes no demand for many years upon the new firm, to pay the sum to the original debtor's estate, he will not be allowed, after the bankruptcy of the new firm, to claim it as a debt due to him from his testator's assets. *Campbell v. Campbell* . . . 233

— 7. **Firms with common partner—Proof.** See **Bankruptcy**, 1.

**PAYMENT**—**Appropriation of.**—A bond was given by country bankers to the several persons constituting the firm of a London banking-house, conditioned for remitting money to provide for bills, and for the repayment of such sums as the London bankers might advance on account of persons constituting the firm of the country banking house, or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the London bankers. It was the course of business between the two houses for the London bankers to send in to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the London bankers received sums in payment more than sufficient to discharge the balance then due; but during the same time they advanced money on account of the country bankers to an equal amount. In the first instance the London bankers entered in their books all receipts and payments made after the death of the deceased partner to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts; one the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts subsequent to that time: Held, that the entries in the books of the London bankers did not amount to a complete appropriation by them of the several payments to the old account, the appropriation not being complete until it was communicated to the party to be affected by it; and therefore that the London bankers, notwithstanding those entries, were entitled to apply the payments received subsequently to the death of the deceased partner to the debt of the new firm. *Simson v. Ingham* . . . 273

**PERJURY**—Evidence on indictment for. See **Evidence**, 2.

**POOR LAW**—1. **Assessment—Notice not specifying property in respect of which assessment is made.**—A poor-rate must shew upon the face of it in respect of what property the assessment is made upon each individual charged by the rate. *R. v. Aire and Calder Navigation* . . . 535

— 2. **Settlement—Illegitimate child.**—An illegitimate child born in an extra-parochial place does not follow the settlement of its mother.—*R. v. The Inhabitants of St. Nicholas* . . . 577

— 3. **Overseer—Appeal against accounts—Notice not stating grounds of appeal.**—A notice of appeal against the allowance of overseers accounts, that the different items thereof (enumerating them), would be objected to without specifying the particular causes or grounds of appeal pursuant to 41 Geo. III. c. 23, s. 4, is insufficient. *R. v. Mayall* . . . 609

**POOR LAW—4. Overseer—Appointment.**—A local Act directed that the then overseers of the parish of W. should continue to be overseers for the remainder of the current year, and until two others should be appointed, and that two overseers should be appointed annually: Held, that this Act did not repeal the statute 43 Eliz. c. 2, s. 1, and that an appointment of four overseers for the parish of W. was valid. *R. v. Pinney* . . . . . 375

— 5. Distress for rates. *See Assignment.*

**POSSESSION—By one tenant in common.** *See Tenant in Common.*

**POWER—Appointment—Election.**—By the marriage settlement of A, a term of years is limited to trustees, upon trust, to raise 16,000*l.* to be paid to the child or children of the marriage, or his, her, or their issue, born in the lifetime of A, in such shares and proportions as A should by deed or will appoint; and in default of appointment, to the children in equal shares: A, by his will, after devising certain real estates to his first and other sons, in strict settlement, and reciting that he was, by the marriage settlement, authorised to appoint the sum of 16,000*l.* unto all or any one or more of his child or children, and grandchild or grandchildren, appointed 4,000*l.* to each of his children other than the child who should, under the preceding limitations, be entitled, as tenant for life, to the rents and profits of the devised premises: and as to the residue, if any, of the 16,000*l.*, he appointed the same unto such grandchild of his body as should, by the regular course of events, become entitled as tenant in tail in possession of the devised premises: A died, leaving three sons, the eldest of whom was tenant for life of the devised estates, and no grandchild. Held that, inasmuch as there might have been a grandchild born in A's lifetime, and as that grandchild would have been among the objects of the power, the appointment of the residue of the 16,000*l.* to a grandchild who, in the events that had happened, was not an object of the power, did not raise a case of election against the children, and that they were entitled to have the appointment of that residue declared invalid, and yet to retain all the benefits given them by the will. *Bulwer v. Hoare* . . . . . 248

**PRACTICE—1. Costs—Information shewing abuses in charity—Costs.**—Relators, on an information upon which abuses in a charity are proved and corrected, are entitled to have allowed to them not merely costs as between party and party, but their costs, charges, and expenses. *Att.-Gen. v. Corporation of Winchester* . . . . . 223

— 2. — There is no general rule by which a plaintiff is compelled to pay the costs of a former action before he proceeds with a second. *Pushley v. Poole* . . . . . 605

— 3. — **Security for costs.**—Where the plaintiff was discharged under the Insolvent Act (having assigned the debt to the assignees of the Court) after issue joined, and before notice of trial given, the Court stayed the proceedings until the assignee, or some creditor of the plaintiff should give security for costs. *Heaford v. Knight* . . . . . 472

— 4. — It is not the habit of the Court to direct security to be given for the result of an account. *Nerot v. Burnand* . . . . . 12

— 5. **Parties to action.**—A person who makes a contract as trustee for others, cannot sustain a suit for specific performance without joining them along with him.

If his *cestuis que trust* are the members of a numerous company, some of them, suing on behalf of themselves and all the other members, ought to join him as co-plaintiffs. *Anonymous* . . . . . 229

— 6. **Service—Original writ not shewn on demand.**—Where a defendant on being served with a copy of a writ, demands to see the original, and it is not shewn to him, the service is irregular, and will be set aside with costs. *Thomas v. Pearce* . . . . . 543

**PRACTICE**—7. Stay of proceedings.—The taking of an account will not be stayed pending an appeal. *Nerot v. Burnand* . . . . . 12

— 8. — *Semble*, that the Court will not stay the proceedings in an ejectment until the costs of a former ejectment are paid, if it appear that the verdict was obtained by fraud and perjury. *Doe d. Rees v. Thomas* 494

— 9. — A plaintiff declared in assumpsit against trustees of a turnpike road generally, went to trial, withdrew his record, and after suffering himself to be non prossed, sued the same trustees a second time by name, for the same cause of action, and the Court refused to stay the proceedings in the second, until the costs of the first action were paid. *Pashley v. Poole* . . . . . 605

— 10. Joinder of parties. See Charitable Trust, 6; Churchwarden, 7.

— 11. Notice of action. See Licence.

**PRINCIPAL AND AGENT**—See Ship and Shipping, 2.

**PRINCIPAL AND SURETY**—1. Bankruptcy of receiver—Delay in passing accounts—Liability of sureties for interest.—A receiver, who had omitted to account regularly, became bankrupt, being indebted to the trust-estate in a large sum; and, for some time, no steps were taken to have his accounts duly passed: Held, that, under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay interest. *Dawson v. Raynes* . . . . . 149

— 2. Money borrowed on behalf of one co-surety.—Parol evidence may be given to show, as between the two co-obligers in a bond, that one of them was only a surety for the other.

A and B join in a bond to secure money borrowed by B, for the use of a third person: as between A and B, A is only a surety. *Bolton v. Cooke* . . . . . 226

**PROMISSORY NOTE**—See Bill of Exchange; Limitations, Statute of.

**PUBLIC HOUSE**—Sale of. See Vendor and Purchaser, 3.

**PUBLIC OFFICER**—Default in accounts—"Public Accountant"—Deputy Assistant Commissary General.—A Deputy Assistant Commissary General held to be a Public Accountant within the meaning of the statutes subjecting the property of certain accountants with the Crown to seizure and sale, for satisfaction of the balance against them. *R. v. Fernandes* . . . . . 701

**RATE**—1. Rate raised to pay off loan in excess of statutory powers—Illegal distress.—Where parties who have a limited authority under an Act of Parliament to raise money by means of a rate, with powers of distress, raise by borrowing a larger sum than they are authorised to do, and impose a rate for the purpose of paying the money so borrowed, the rate is bad *in toto*, and a distress made to recover it is unwarranted. *Richter v. Hughes* 424

— 2. Stalls in market—"Tenement."—By 32 Geo. III. c. 69, rates were to be made upon "the tenants or occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens or garden-grounds, and other tenements situate within the towns of M. and S. respectively:" Held, that the owner of certain markets kept in the street of M., in which various articles were exposed to sale, by persons who paid him for that privilege, but had not any stalls fixed to the ground, was not the occupier of a "tenement" within the meaning of the Act; and therefore was not liable to be rated in respect of the profits of the markets. *R. v. Mosley* . . . . . 328

And see Poor Law, 1.

**RECEIVER**—1. **Appointment of.**—How far the defective constitution of a suit, as to parties, is an objection to the appointment of a receiver. *Gray v. Chaplin* . . . . . 22

— 2. **Bankruptcy of.** See **Principal and Surety**, 2.

**RECOVERY**—Defect in exemplification.—The exemplification of a recovery, suffered in bar of an entail, cannot be impeached by the recovery deed itself, although it is suggested that there have been alterations and erasures made in the latter, not noticed in the former. *Doe d. Wilmot v. Pickering* . . . . . 610

**ROOKERY**—Disturbance of.—Declaration stated that plaintiff was possessed of a close of land with trees growing thereon, to which rooks had been used to resort and to settle, and build nests and rear their young in the trees, by reason whereof plaintiff had been used to kill and take the rooks and the young thereof, and great profit and advantages had accrued to him, yet that defendant wrongfully and maliciously intending to injure the plaintiff, and alarm and drive away the rooks, and to cause them to forsake the trees of the plaintiff, wrongfully and injuriously caused guns loaded with gunpowder to be discharged near the plaintiff's close, and thereby disturbed and drove away the rooks, whereby the plaintiff was prevented from killing the rooks, and taking the young thereof. Plea, not guilty: Held, on motion in arrest of judgment, that this action was not maintainable, inasmuch as rooks were a species of birds *feræ naturæ*, destructive in their habits, not known as an article of food or alleged so to be, and not protected by any Act of Parliament, and the plaintiff could not therefore have any property in them, or shew any right to have them resort to his trees. *Hannam v. Mockett* . . . . . 591

**SALE OF GOODS**—1. **Sale by auction**—**Delivery and acceptance.**—By the conditions of a sale by auction, the purchaser was to pay 30 per cent. upon the price, upon being declared the highest bidder, and the residue before the goods were removed. A lot was knocked down to A., as the highest bidder, and delivered to him immediately. After it had remained in his hands three or four minutes, he stated that he had been mistaken in the price, and refused to keep it. No part of the price had been paid: Held, that it was a question of fact for the jury, whether there had been a delivery by the seller, and an actual acceptance by the buyer, intended by both parties to have the effect of transferring the right of possession from one to the other. *Phillips v. Bistolli* . . . . . 433

— 2. **Sale by auction**—**Conditions of sale not annexed to catalogue.**—At a sale of goods by auction, certain conditions of sale were read before the biddings commenced, but were not attached to the catalogue. An agent for the defendant was the highest bidder for a lot, and the auctioneer put down the price 105*l.*, and the agent's name opposite that lot, in his catalogue: Held, that sales of goods by auction are within the 17th section of the Statute of Frauds, and that no sufficient memorandum of the bargain was signed to satisfy that section, the conditions of sale not being annexed to the catalogue. Had they been annexed, it would have sufficed to put down the agent's name, that of his principal not being necessary. *Kenworthy v. Schofield* . . . . . 600

— 3. **Non-delivery**—**Measure of damages.**—In assumpsit for not delivering goods upon a given day, the true measure of damages is the difference between the contract price and that which goods of a similar quality and description bore, on or about the day when the goods ought to have been delivered. *Gainsford v. Carroll* . . . . . 495

— 4. **Several articles, each costing less than 10*l.***—**Entire contract**—**Acceptance and delivery.**—A. went to the shop of B. and Co., linen-drappers, and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.* A separate

price for each article was agreed upon; some A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them: Held, first, that this was all one contract, and therefore within the 17th section of the Statute of Frauds. Secondly, that there was no delivery and acceptance of any of the goods so as to take the case out of the operation of that section. *Baldey v. Parker*. . . . . 260

**SALE OF GOODS—5. Stoppage in transitu—Re-sale—Delivery.**—A., by contract sold to B. a quantity of tallow, then lying at a wharf, at so much per cwt.; and on the same day gave a written order upon the wharfingers to weigh, deliver, transfer, and re-house the same. B. having entered into a contract to sell tallow to C., obtained from the wharfingers and gave to C. a written acknowledgment that they had transferred the tallow to the account of C., and that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order: Held, in an action of trover by C. against the wharfingers, that after their acknowledgment, they held the tallow as the agents of C., and that they could not therefore set up as a defence a right in A. to stop it in *in transitu*. *Hawes v. Watson*. . . . . 448

**SCHOOL—1. Grammar or National School—Intentions of founder.**—Where a school, upon the true construction of the instruments establishing it, ought to be a grammar-school for instruction in the classics, the trustees will not be permitted to convert it into a school for teaching merely English, writing, and arithmetic, though it had ceased, from before the time of living memory, to be a place for classical education, and though it appeared from old regulations, that elementary instruction in English had always been one of the objects of the institution.

Where the original statutes of such a school show that the intention of the founder was, that the master should be employed personally in teaching the children, he must not leave the detailed management of the school to an usher; nor is it any excuse for his doing so, that, as minister of a chapel annexed to the school, he devotes his time to ecclesiastical duties. *Att.-Gen. v. Earl of Mansfield*. . . . . 155

— 2. Trust for maintenance of. See Charitable Trust, 4.

**SETTLEMENT (MARRIAGE).** See Power.

**SHIP AND SHIPPING—1. Charter-party—"Non-arrival."**—Where the charterers of a ship for a voyage from C. to St. B., and thence to G. to take in a homeward cargo, caused another ship to be chartered on their account to go out in ballast and bring home a cargo from G., with a proviso, that in the event of the non-arrival of the first-mentioned ship at G., then the second charter should be void: Held, that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not being attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. *Soames v. Lonergan*. . . . . 460

— 2. Agreement for variation in voyage stipulated in charter-party—Signature by agent in his own name—Personal liability for freight.—The consignee and agent of a vessel chartered for a specific voyage, enters into an agreement with the captain, describing himself as "consignee and agent" of the above brig and cargo, on behalf of Mr. M. merchant, of L." the agreement stating, that "it is witnessed, that the said parties agree" that the vessel shall go to another port, there discharge the remainder of her cargo, and receive a full and complete homeward cargo at the same freight as she would have got had she proceeded on the voyage stipulated in the charter-party, and then signs the agreement in his own



name, without describing himself as agent: Held, that he made himself personally liable for the freight of the homeward voyage. *Kennedy v. Gouveia* . . . . . 616

**SHIP AND SHIPPING**—3. **Sale of ship—Warranty—Statement in void agreement not contained in bill of sale.**—Defendants' testator being sole owner of a ship, signed and delivered to the plaintiff, G. J. K., an instrument, describing the ship as copper bolted, (but not reciting the certificate of registry); at the foot of which was written, "sold the within mentioned ship to G. J. K." He afterwards executed a bill of sale to the plaintiff in the usual form, which did not describe the ship as copper bolted. She was not copper bolted, and plaintiff declared in assumpsit against the defendants (as executors of the vendor,) for the breach of his warranty in that particular: Held, (1) that the action could not be maintained, on the ground that the first-mentioned instrument was void as a contract by the statute then in force; and (2) that the statement in the instrument could not be treated as a warranty, since the parties ultimately embodied their contract in a written instrument not containing that statement. *Kain v. Old* . . . . . 497

— 4. **Sale by sheriff—Lien of sail-maker on sails—Redemption by purchaser—Recovery from sheriff—Delay in informing sheriff.**—The sheriff sold a vessel and her stores by public auction under an execution. The sails were seized on the premises of a sail-maker. At the time the purchase was completed, in August, 1822, the sheriff gave to the purchaser an order on the sail-maker to deliver up the sails; but he refused, alleging that he had a lien upon them for 60*l*. The purchaser did not, however, inform the sheriff of this refusal until after the sheriff had in due course parted with the purchase money. Held, that the purchaser having subsequently paid a sum of money in discharge of the lien, could not recover it from the sheriff. *Duncan v. Garrett* . . . . . 629

— 5. **Sale of shares in ship—Illegal stipulation in deed.**—The sale of five-sixteenth shares of a ship engaged in the employment of the East India Company, by a deed containing a stipulation that the purchaser should, after the completion of the current voyage, be appointed to the command, held to be illegal and void. *Card v. Hope* . . . . . 503

**SLAVE TRADE**—**Action by British subject against commander of ship for detaining slaves.**—Where certain persons, who had been slaves in a foreign country where slavery was tolerated by law, escaped thence and got on board a British ship of war on the high seas: Held, that a British subject, resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of a ship for harbouring the slaves after notice. *Forbes v. Cochrane* . . . . . 402

**SOLICITOR**—**Articled clerk—Covenant in articles not to practise in particular district—Infancy—Injunction.**—Articles, under which A. had served his clerkship to an attorney, contained a proviso, that A. should not practise within a certain district; and also a covenant on the part of his father, that A. should, within a month after he came of age, execute a bond in a specified penalty to ensure his fulfilment of the proviso; A., who was an infant at the time of the execution of the articles, served under them for three years after he attained his full age, but was never called on to execute any bond, and, with a knowledge of the purport of the articles, completed his clerkship, and afterwards began to practise as an attorney within the district from which the articles purported to exclude him: A motion for an injunction to restrain him from practising within that district was refused with costs. *Capes v. Hutton* . . . . . 102

**SOLICITOR AND CLIENT**—1. **Negligence—Neglect to subpoena material witness.**—The father of a party to a cause was a material witness. The attorney did not serve him with a subpoena, but the witness was told that he must attend the trial on the following day. The verdict was lost

in consequence of his non-attendance: Held, that the attorney had not been guilty of such negligence that an action would lie against him. *Price v. Bullen* . . . . . 645

**SOLICITOR AND CLIENT**—2. Lien for costs—Bankrupt client.—An attorney has a lien upon papers belonging to a bankrupt, not only for his bill for business done, but for the costs of an action brought against the bankrupt, subsequently to the issuing of the Commission, to recover the amount of his bill. *Lambert v. Buckmaster* . . . . . 492

**SPECIFIC PERFORMANCE.** See Vendor and Purchaser.

**STAMP DUTY**—Order for payment of money.—A. having consigned goods to B., sent him the following order: "Pay to A. B. the proceeds of a shipment of goods, value about 2,000*l.*, consigned by me to you." B., by writing, consented to pay over the full amount of the net proceeds of the goods: Held, that neither of these instruments required such a stamp as the Stamp Acts imposed on bills, drafts, or orders for the payment of money. *Jones v. Simpson* . . . . . 371

**STATUTE**—Penal—Removal of proceedings under. See Criminal Law, 3.

**TENANT IN COMMON.**—Possession by one tenant in common does not necessarily amount to ouster of another. *Johnson v. Burslem* . . . 212

**TROVER.** See Banker: Execution, 1.

**TRUST.** See Charitable Trust.

**VENDOR AND PURCHASER**—1. Specific performance—Error in quantity—Statute or customary acres—Reference of title.—A contract for the purchase of a farm described it as containing "349 acres or thereabouts, be the same more or less;" and stipulated that the premises should be taken at the quantity above stated, whether more or less: in fact, the farm consisted of only 349 customary acres, which were less than the same number of statute acres by about 100 acres or upwards. On a bill being filed for specific performance, the purchaser, admitting that he had been for several months in possession of the property, and had exercised acts of ownership over it, on the faith that a good title to 349 acres would be shown, insisted, that, in the contract, acres meant statute acres, and that he was not bound to perform the contract, unless 349 statute acres were conveyed to him: Held, that in such a case, a reference of title would not be directed on motion. *Portman v. Mill* . . . . . 175

— 2. — Property held under one lease—Sale in lots—Indemnity against entire rent.—Executors sell by auction, in nine lots, houses, which the testator held by lease under the Crown, and of which the executors obtained a new lease, subject to one entire rent of 243*l.*; the printed particulars mention that the sale is by executors, and that the nine lots are all held under one lease, and at one entire reserved rent: Decreed, upon a bill filed by the vendors, and an answer, submitting to perform the contract upon an indemnity being given,—that the purchaser of one lot, with respect to which the particulars stated that the apportioned rent for it was 52*l.*, was entitled to have an indemnity from the executors against his liability for the whole reserved rent, and the breach of any of the covenants in the original lease. *West v. Wild* . . . . . 216

— 3. — Public-house—Refusal of purchaser to take possession—Trade carried on by vendors—Liability of purchaser.—By an agreement entered into with executors for the purchase of a leasehold public-house, and the goodwill and licences connected with it, the household furniture, stock in trade, and other effects upon the premises, were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th of September, 1821: the valuation was made, but, on the 29th of September, the purchaser, alleging that there was a defect in the

title to the leasehold, refused to perform his contract: the executors filed a bill for specific performance, but in the meantime remained in possession of the house, and carried on the business: Held, that though the executors were entitled to a decree for specific performance, and though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since September, 1821:

That he could not be compelled to take that portion of the stock in trade on the premises at the time of the decree, which was not there at the date of the agreement, but had been substituted for such parts of the old stock as had been consumed in the usual course of the business:

That the purchaser ought to be charged with rent, taxes, and other outgoings, paid by the executors since September, 1821, and with interest on the sums so paid by them:

That the purchaser was not entitled to any occupation-rent, or other allowance for the use of the house and furniture by the executors during the period that elapsed after the 29th of September, 1821. *Dakin v. Cope* . . . 37

**VENDOR AND PURCHASER—5. Specific Performance—Purchaser in possession—Waiver of objection to title.**—Consent to accept a title, given under the influence of representations made on the part of the vendor, which turn out to be inaccurate, will not bind a purchaser.

If a purchaser, entitled by his agreement to possession, exercises acts of ownership under the persuasion that the title is perfect, and that nothing will intervene to prevent the completion of the agreement; he is not thereby precluded from having a reference on the question of title, as to objections not appearing on any abstract delivered to him prior to the exercise of the acts of ownership. *Johnes v. Cloughton* . . . 188

— 6. Non-disclosure of incumbrance by vendor—Fraud—Purchaser for value—Notice—Priority. See *Mortgage*, 4.

**WARRANT OF ATTORNEY.**—If the parties to a warrant of attorney agree that execution shall issue upon the judgment after a year and a day without reviving the judgment by *sci. fa.* there is nothing illegal in such a bargain, and execution may be taken out notwithstanding the stat. Westm. 2. *Morris v. Jones* . . . 620

**WARRANTY—On sale of ship.** See *Ship and Shipping*, 3.

**WASTE—Equitable—Injunction.**—Equitable waste consists in cutting either timber planted for ornament or shelter, or saplings and young trees, before they are fit for timber.

It is not equitable waste to cut trees which have not attained their full growth and maturity; and an injunction to restrain a tenant for life, unimpeachable of waste, from such cutting, cannot be sustained.

The Court will not maintain an injunction against equitable waste, unless it be proved that equitable waste either has been committed, or is threatened. *Potts v. Potts* . . . 235

**WATER—Natural right to running water.**—In an action on the case a plaintiff alleged in his declaration that he was possessed of a messuage, and by reason thereof entitled to the use of a stream of water running through the premises for supplying the same with water; and that defendant erected a certain dam higher up the stream, and thereby prevented the water from running in its usual course, in its usual calm and smooth manner, and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff; and on issue joined on a plea of not guilty, the jury found that the plaintiff's banks and premises were not injured by the dam erected by the defendant; but added that the defendant had no right to stop the water in the summer-time; the

Judge ordered the verdict to be entered for the defendant: Held, that the verdict was right, for flowing water is *publici juris*, and an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose, and therefore, the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water. *Williams v. Morland* . . . . . 579

**WILL—1. Ademption of legacy.**—A testator bequeaths all his right, title, and interest in two policies of insurance, which he had effected on the life of his wife, together with all benefit and advantage thereof, to his executors upon trust, after the death of his wife, to receive the amount of the policies, and thereout to pay or provide for certain legacies; his wife having died, he received the money, and invested it in securities, of which he continued possessed at his death: Held, that the legacies failed. *Barker v. Rayner* 18

— 2. **Condition.**—R. Lowe, by his will, made in 1781, gave all his property, real and personal, to three trustees and executors; he then warned his executors to make early applications, in order to get in his personal property, or it would be lost; then he gave 10,000*l.* to his daughter, Charlotte, on condition that she married with consent of two of the trustees; but in case she should marry one of three kinsmen, W., T., or J. Drury, then he gave him certain estates on taking the name of Lowe; but in the event of her not marrying either of them, then he gave those estates to any one of the sons of E. M. Mundy on the same condition; then he gave the remainder of his property to the person, having a certain property himself, who should marry either of his daughters, on taking the name of Lowe. And in case neither of his daughters married as above described, then he gave all his property to W. Drury, and his heirs, on taking the name of Lowe.

At the date of the will the plaintiff, then W. Drury, was a bachelor, and Ann, the testator's younger daughter, was fourteen years old. E. M. Mundy had five sons, of whom the eldest was then seven years old.

The testator, in 1785, made a codicil, reciting the marriage of his daughter Charlotte, and that he had given her 10,000*l.*, and provided for her children. He thereupon revoked his will as to her. Then he gave to his younger daughter Ann, the same choice of marrying into the favoured families of Drury and Mundy, or a person with a certain property; and if she did not, then she was to have 10,000*l.* Ann came of age in 1788, and in the following year married a gentleman not within the description of the will or codicil. At that time the plaintiff was a married man.

Held, that on the marriage of Ann, and W. Drury taking the name of Lowe, he took an indefeasible estate in fee-simple. *Lowe v. Lord Huntingtower* . . . . . 633

— 3. **Contingent remainder—Defeat of devise over by destruction of particular estate.**—Devise "to testator's son G. for life, and from and after his decease unto all and every the child and children of G. lawfully to be begotten, and their heirs for ever, to hold as tenants in common, and not as joint tenants; but if my son G. should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then I give and devise the same estates unto my son T., my daughter A. S., and my son-in-law W. D., and to their heirs for ever, as tenants in common, and not as joint tenants." After testator's death, G. suffered a recovery, and died unmarried and without issue: Held, that in that event the devise over must take effect as a contingent remainder, and was therefore defeated by the destruction of the particular estate by the recovery. *Doe d. Herbert v. Selby* . . . . . 585

— 4. **Contingency unprovided for.**—A testatrix devises real estates to trustees upon trust, to raise out of the same, by mortgage, a sum sufficient to pay certain legacies, which are made payable twelve months after her decease, and subject to that charge in trust for R. N. in fee:

"provided that if R. N. shall not, within six calendar months after my decease, by writing under his hand and seal, &c., accept the devise; and shall not at the same time secure to the satisfaction of the said trustees, or pay to them a sum of money sufficient to satisfy the legacies;" she directed her trustees to stand seised of the real estates upon trust to sell the same, and to distribute the money among the legatees, in proportion to the amount of their several legacies: R. N. died in the lifetime of the testatrix. Held, that the legatees are entitled only to their legacies, and not to the whole produce of the estate. *Davidson v. Davidson* . . . . . 230

**WILL—5. Direction in certain events to raise money out of specific fund—Failure of contingency.**—A sum of money directed by a will to be raised out of a certain fund in a contingency which fails, sinks into the residue and accrues to the persons entitled to the residue of that fund. *Noel v. Noel* . . . . . 660

— 6. **Dividends of trust fund.**—A testator directs that his trustees shall stand possessed of a certain sum of stock, upon trust for D. until D. shall have attained his age of 25 years, with a direction that they shall transfer the stock to D. as soon as they in their discretion think proper, and that it shall sink into the residue, which is given over, in case D. dies without lawful issue before he receives the bequest: Held, that the right to the dividends which accrue before D. has attained his age of 25 years, or has had a transfer made to him, is suspended to go finally along with the capital. *Gordon v. Rutherford* . . . . . 183

— 7. **Exoneration of personalty.**—Circumstances manifesting indication of intention in a will to exonerate personalty from debts. *Noel v. Noel* . . . . . 660

— 8. **Gift of profits of business and of share in partnership.**—If a testator directs that A. shall carry on the testator's trade, with a capital taken from the testator's personal estate, and shall educate and support D., and bind him apprentice to himself, and that, upon the expiration of the apprenticeship, or so soon as A. shall think D. capable, A. shall take D. into the business as a partner; held that D. is not entitled to claim a share of the profits from the death of the testator, and that he has no right to be admitted a partner at any time, unless his conduct is such as to render him not unfit for the situation. *Gordon v. Rutherford* . . . . . 183

— 9. **Legacies by will and by codicil—Cumulative or substitutinal.**—A testator by his will bequeathed 4,000*l.* in trust after the death of his daughter C., who was then unmarried, for her children, to be paid, if the children were under 21 and unmarried at her death, to such of them as were sons, at their ages of 21, or sooner, if the trustees should think fit; and to such of them as were daughters, at their ages of 21 years or days of marriage; but, if after C.'s decease, the children should all die under 21, and unmarried, then in trust for C.'s next of kin in consanguinity. C. married and died, leaving B. her only son, an infant. After her death, the testator by a codicil bequeathed to his grandson R. 6,000*l.* payable when he should attain the age of 21 years, and directed his executor to expend any sum not exceeding 250*l.* a year in the maintenance and education of R.: Held, that the legacy of 6,000*l.* was not a substitution for the legacy of 4,000*l.*, and that R. was entitled to both legacies. *Wray v. Field* . . . 61

— 10. — — — **Legacies given by a codicil, held to be additions to, and not substitutions for, legacies given by the will to the same legatees.** *Mackenzie v. Mackenzie* . . . . . 64

— 11. **Legacy duty—Legacy given by will free of duty—Gift by codicil to husband of deceased legatee—Substitution.**—A testator bequeathed to his daughter 50,000*l.*, of which 20,000*l.* was to be paid to her absolutely, and, as to the remaining 30,000*l.*, she was to receive the interest

to her separate use during her life, and, after her death, the principal was to be paid to such person or persons as she might by her will appoint; and, after giving other legacies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed, that all the specific and pecuniary legacies thereinbefore bequeathed should be paid to the respective legatees free of legacy duty: the daughter having died in his lifetime, he afterwards, by a codicil, "instead of the legacies given to her by my will, which are now lapsed," bequeathed to her husband 20,000*l.*: Held, that the husband was not entitled to have the 20,000*l.* paid to him free of legacy duty. *Chatteris v. Young* . . . . . 44

**WILL**—12. **Legal estate**—Subsequent words of gift as controlling general devise to trustees.—A devise to trustees for purposes which may require them to deal with the fee-simple of the estate, vests the legal estate in them accordingly, notwithstanding subsequent words of direct gift to the beneficiaries. *Murthwaite v. Jenkinson* . . . . . 384

— 13. **"Son" used as word of limitation.**—A. being seised in fee of an estate called H., subject to a mortgage for years, by his will (in which there was a statement in figures of the amount of the estimated value of his entire property, of the sum which his wife had brought him on his marriage, and of the sum which he himself had settled upon his marriage, and of the estimated value of the estate at H.,) directed that his daughter C. M. should have the disposal of the sum which he himself had settled on his wife, and in case she did not dispose of it, that it was to go to certain persons therein named. He then desired that H. should go to his daughter C. M. as follows: in case she married and had a son, to go to that son; in case she had more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she had but one daughter or no child at that time, he desired it might go to his brother W. M. He then gave specific legacies nearly to the amount of the sum which remained, after deducting the money settled on his marriage and the value of the estate at H. And he directed that his daughter should pay an annuity to a person therein named for life; and then he made his brother W. M. his sole legatee: Held, that C. M. took an estate in tail male in H., with a reversion in fee, subject to the other estates created by the will. *Mellish v. Mellish* . . . . . 436

**WORDS**—"All ways thereunto appertaining." See **Easement**.

— "Non-arrival." See **Ship and Shipping**, 1.

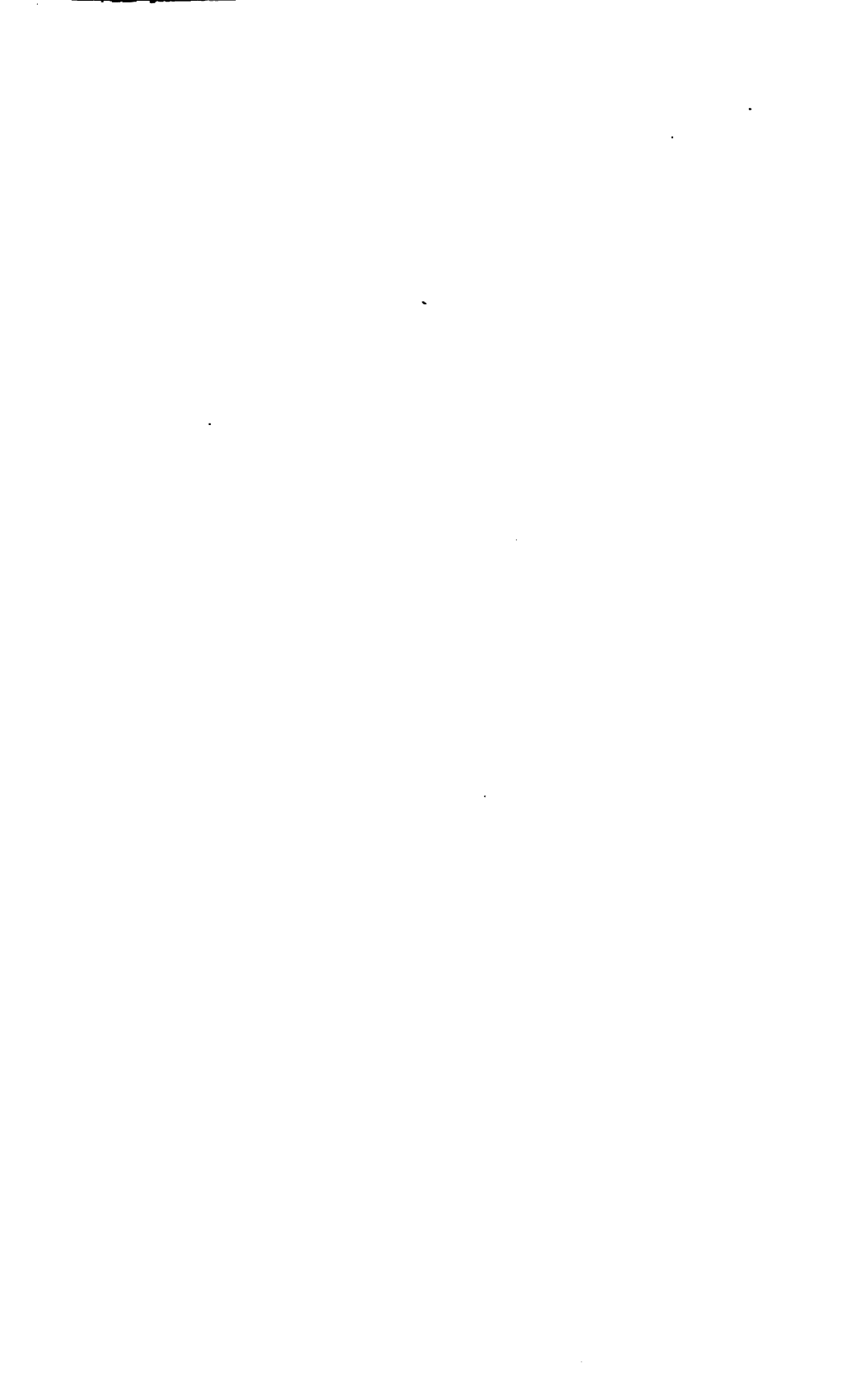
— "Public Accountant." See **Public Officer**.

— "Son." See **Will**, 13.

— "Tenement." See **Rate**, 2.

— "Void." See **Landlord and Tenant**, 7.

**WRIT**—See **Execution**.









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